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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1071.

THE BURROW-GILES LITHOGRAPHIC COMPANY, PLAINTIFF IN ERROR,

vs.

NAPOLEON SARONY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 9, 1883.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Napoleon Sarony and The Burrow-Giles Lithographic Company, a manifest error hath happened, to the great damage of the said Burrow-Giles Lithographic Company as is said, and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

Allowed Aug. 9, 1883.

ADDISON BROWN.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty-two inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Burrow-Giles Lithographic Company, plaintiff in error, against Napoleon Sarony, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 1st day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[SEAL.] TIMOTHY GRIFFITH.

(Indorsed:) U. S. Supreme Court. The Burrow-Giles Lithographic

Company, pl'ff in error, vs. Napoleon Sarony, def't in error. Writ of error. Lewis Sanders, counsel for pl'ff in error. Temple court, room 100, N. Y. City. U. S. circuit court. Filed Sep. 19, 1880. Timothy Griffith, clerk.

Due service of within papers hereby admitted, New York, September 10, 1883. W. C. Wirter, attorney for def't in error.

3 NEW YORK, *April 14th*, 1882.

To the clerk of the circuit court of the United States for the southern district of New York:

SIR: Please issue summons (for relief without notice) out of the circuit court of the United States for the southern district of New York, on the part of Napoleon Sarony, plaintiff, against The Burrow-Giles Lithographic Company, defendant, in an action at law.

GUERNSEY SACKETT,
Plaintiff's Attorney, 21 *Park Row, New York.*

A. T. GURLITZ,
Of Counsel.

(Endorsed:) Circuit court of the United States, southern district
4 of New York. Napoleon Sarony, plaintiff, vs. The Burrow-Giles Lithographic Company, defendant. Præcipe. Guernsey Sackett, pl'ff's att'y, 21 Park Row, New York. U. S. circuit court. Filed Ap'r 14, 1882. Joseph M. Deuel, clerk.

5 United States circuit court for the southern district of New York.

NAPOLEON SARONY, PLAINTIFF,
against
THE BURROW-GILES LITHOGRAPHIC COMPANY, defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 14 day of April, in the year one thousand eight hundred and eighty-two.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

GUERNSEY SACKETT,
Plaintiff's Attorney.
Office and post-office address: 21 Park Row, New York City.

6 (Indorsed:) The United States circuit court, southern district of New York. Napoleon Saroney, plaintiff, vs. The Burrow-Giles

Lithographic Company, defendant. Summons. Guernsey Sackett, plaintiff' attorney, 21 Park Row, N. Y. City. U. S. circuit court. Filed Apr. 27, 1882. Joseph M. Deuel, clerk.

I hereby certify that on the 14th day of April, 1882, at the city of New York, in my district, I personally served the within-named summons upon the within-named The Burrow-Giles Lithographic Company, by exhibiting to J. F. Burrow, treasurer of said company, the within original and at the same time leaving with him a copy thereof.

Dated April 27th, 1882.

HENRY E. KNOX,
U. S. Marshal, S. D. N. Y.
N. B.

7 *Complaint.*

Circuit court of the United States for the southern district of New York.
In the second circuit, at April term, 1882.

NAPOLEON SARONY, PLAINTIFF,
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY,
defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Napoleon Sarony, a citizen of the United States, and resident of the State of New York, and within the city of New York, in the United States, plaintiff in this action, by Guernsey Sackett, his attorney, complains of The Burrow-Giles Lithographic Company, a corporation organized under the laws of the State of New York, carrying on its business and having its place of business in the said city of New York, and within the southern district of New York, defendants in this action, as follows, to wit:

This plaintiff says, upon information and belief, that The Burrow-Giles Lithographic Company, the defendant, is a corporation organized
8 under the laws of the State of New York, carrying on its business in the city of New York and county of New York, in the southern district of New York, and that its business is the manufacture of labels, show cards, chromos, and lithographic and color printing of every description. For a first cause of action he saith:

Firstly. That for many years prior to and at and since the times mentioned in this complaint the plaintiff resided in and carried on business in the city and State of New York, in the United States, said business being that of photographer, and that he is and was well and favorably known in such business, and that plaintiff's said business was and is carried on and he was and is known under the name of "Sarony," which is this plaintiff's business name, it being now and having been for many years a general custom in the photograph business with persons carrying
9 on the same to use the surname alone.

That heretofore, about the month of January, 1882, this plaintiff made an agreement with one Oscar Wilde whereby the said Wilde, for good and valuable consideration paid and to be paid to him by this plaint-

iff, sold to this plaintiff his said Wilde's portrait, and granted to this plaintiff the sole and exclusive right, privilege, and authority, so far as he could confer the same, to make, publish, sell, and dispose of portraits of him, said Wilde, in the United States; and that under and by virtue of said agreement this plaintiff made, invented, and designed a certain photograph and the negative thereof of and from him, the said Wilde, at his, this plaintiff's, place of business, in the United States, and within said southern district of New York, and that the same is the photograph hereinafter referred to, and that the title of such photograph is "Oscar Wilde No. 18," being the number used to designate this particular photo-
10 graph, and that a copy of said photograph, marked "Exhibit A, April 14, 1882," is hereto annexed and made a part hereof.

Second. And this plaintiff further says that the said photograph, the title of which is "Oscar Wilde, No. 18," and which is the subject of this suit, is a new, useful, harmonious, characteristic, and graceful picture, and that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by this
11 plaintiff, producing the picture which is the subject of this suit; and that the terms "author," "inventor," "designer," as used in this complaint and in the art of photography mean the person who so produces the photograph.

12 Third. And the plaintiff further sheweth that he is the author, inventor, designer, and proprietor of the certain photograph and negative thereof, the title or description of which is "Oscar Wilde, No. 18," and being such author, inventor, designer, and proprietor, and being a citizen of the United States, and desiring to obtain the copyright of the same, in conformity with the provisions of the Revised Statutes of the United States, this plaintiff, on the 14th day of January, A. D. 1882, and before the publication thereof, did deliver at the office of the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said book or other article, to wit, of said photograph, in the following words, to wit, "Oscar Wilde, No. 18," and duly paid the fee required by law for recording the said title, to wit, the sum of fifty cents, to said Librarian of Congress, and that said Librarian of Congress did record the title of said copyright, book, or other article, to wit, said photograph, in a book kept for that purpose, as required by section 4957 of the Revised Statutes of the United States; and the said Librarian of Congress, to wit, A. R. Spofford, esq., did thereupon give a copy of the title or description thereof, under the seal of the Librarian of Congress, to the plaintiff as proprietor thereof, for which the said plaintiff did pay him the fee required by law therefor, to wit, fifty cents.

Fourth. And the plaintiff further sheweth that within ten days from the publication thereof, to wit, on the 14th day of January, A. D. 1882, he did deliver at the office of the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright, book, or other article,

to wit, two copies of such photograph, and that said Librarian of Congress thereupon duly gave to the plaintiff a certificate of the delivery of the same under the seal of the Librarian of Congress.

Fifth. And the plaintiff further sheweth that having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such cases made and provided as aforesaid, he thereby obtained the copyright in the United States for said book or other article, to wit, for said photograph, in due form of law, and there was granted and secured to him, said plaintiff, and that he had the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same for the term of twenty-eight years from the said time of recording the title thereof, to wit, from the 14th day of January, A. D. 1882.

Sixth. And the plaintiff further sheweth that he did duly give the notice of his said copyright as required by the Revised Statutes of the United States and the act amending the same by inscribing upon some visible portion of the several copies of every edition published of said photograph, by inscribing upon some visible portion of the substance upon which were mounted the several copies of every edition published of said photograph, upon the face or front thereof, the following words, to wit: "Copyright, 1882, by N. Sarony."

Seventh. And the plaintiff further sheweth that thereupon and ever since he obtained said copyright as aforesaid he has been the owner thereof, and has expended large sums of money in obtaining the aforesaid privilege from said Wilde, and in making and publishing the said copyright photograph, and is entitled to all the benefits and advantages of the same; that he made sufficient numbers of said copyrighted photograph and had and has the same for sale to the public at a reasonable price, and is and
13 was able and desirous of supplying the public therewith, and is entitled to receive the profits to be derived from the exclusive and sole liberties so to him secured as aforesaid, and that prior to the unlawful acts of the defendants hereinafter set forth he made great gains and profits by his said copyright and the publication and vending of the said copyrighted photograph.

Eighth. And the plaintiff further sheweth upon information and belief that while he the said plaintiff was lawfully in possession of his aforesaid rights and liberties, and in the receipt of the gains and profits of his said photograph, copyrighted as aforesaid, the said defendants, The Burrow-Giles Lithographic Company, who are engaged in the business of lithographing and printing in the city of New York as aforesaid, well knowing the premises and the rights so secured to the plaintiff, and without the consent of the plaintiff, the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, and within two years next before the commencement of this action, to wit, since the 20th day of January, A. D. 1882, and after the recording of the title of the said photograph as aforesaid, and within the term limited, to wit, within twenty-eight years from recording the title thereof as aforesaid, did, within said city of New York, and within the United States, engrave, etch, work, copy, and print, either in whole or in part, or by varying the main design with intent to evade the law, great numbers, to wit, eighty-five thousand copies of said copyright photograph, one of which copies is hereto annexed marked

"Exhibit B, April 14, 1882," and made a part hereof, and knowing the same to be so printed did sell, or did expose to sale great numbers, to wit, eighty-five thousand copies thereof, all at the said city of New York, and within said southern district of New York, and within the United States, all contrary to the statute in such case made and provided, contrary to section 4952 and section 1965 of the Revised Statutes of the United States, and to the great damage of the plaintiff, whereby and by force of the statute the said defendants forfeited to the plaintiff, the proprietor of the said copyright, all the plates on which the same were copied as aforesaid, and that the value of such plates is and was two hundred dollars.

And that by reason of the premises the said defendants also further forfeited to the plaintiff, the proprietor of said copyright, every sheet thereof, to wit, of the aforesaid eighty-five thousand copies, either copied or printed, and that the value of said sheets of said eighty-five thousand copies, is eight hundred and ten dollars, whereby there accrued to the said plaintiff the aggregate of said several sums, to wit, the sum of ten hundred and ten dollars, for which said sum of ten hundred and ten dollars the plaintiff claims judgment against the defendants.

14 For a second cause of action he saith:

First. That for many years prior to and at and since the times mentioned in this complaint the plaintiff resided in and carried on business in the city and State of New York, in the United States, said business being that of photographer, and that he is and was well and favorably known in such business, and that plaintiff's said business was and is carried on, and he was and is known under the name of "Sarony," which is this plaintiff's business name, it being now and having been for many years a general custom in the photograph business, with persons carrying on the same, to use the surname alone.

That heretofore, about the month of January, 1882, this plaintiff made an agreement with one Oscar Wilde, whereby the said Wilde, for a good and valuable consideration, paid and to be paid to him by this plaintiff, sold to this plaintiff his, said Wilde's, portrait, and granted to this
15 plaintiff the sole and exclusive right, privilege, and authority, so far as he could confer the same, to make, publish, sell, and dispose of portraits of him, said Wilde, in the United States; and that under and by virtue of said agreement this plaintiff made, invented, and designed a certain photograph and the negative thereof of and from him, the said Wilde, at his, this plaintiff's, place of business in the United States and within said southern district of New York; that the same is the photograph hereinafter referred to, and that the title of such photograph is "Oscar Wilde, No. 18," being the number used to designate this particular photograph, and that a copy of said photograph, marked "Exhibit A, April 14, 1882," is hereto annexed and made a part hereof.

Second. And this plaintiff further says that the said photograph, the title of which is "Oscar Wilde, No. 18," and which is the subject of this suit, is a new, useful, harmonious, characteristic, and graceful
16 picture, and that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said

photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation made entirely by this plaintiff, producing the picture which is the subject of this suit; and that the terms, "author," "inventor," "designer," as used in this complaint and in the art of photography, mean the person who so produces the photograph.

17 Third. And the plaintiff further sheweth that he is the author, inventor, designer, and proprietor of the certain photograph and negative thereof, the title or description of which is "Oscar Wilde No. 18," and being such author, inventor, designer, and proprietor, and being a citizen of the United States, and desiring to obtain the copyright for the same, in conformity with the provisions of the Revised Statutes of the United States, this plaintiff, on the 14th day of January, A. D. 1882, and before the publication thereof, did deliver at the office of the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said book or other article, to wit, of said photograph, in the following words, to wit, "Oscar Wilde No. 18," and duly paid the fee required by law for recording the said title, to wit, the sum of fifty cents, to said Librarian of Congress; and that said Librarian of Congress did record the title of such copyright, book, or other article, to wit, said photograph, in a book kept for that purpose, as required by section 4957 of the Revised Statutes of the United States; and the said Librarian of Congress, to wit, A. R. Spofford, esq., did thereupon give a copy of the title or description thereof, under the seal of the Librarian of Congress, to the plaintiff as proprietor thereof, for which the said plaintiff did pay him the fee required by law therefor, to wit, fifty cents.

Fourth. And the plaintiff further sheweth that within ten days from the publication thereof, to wit, on the 14th day of January, A. D. 1882, he did deliver at the office of the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright, book, or other article, to wit, two copies of such photograph, and that said Librarian of Congress thereupon duly gave to the plaintiff a certificate of the delivery of the same under the seal of the Librarian of Congress.

Fifth. And the plaintiff further sheweth that having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such cases made and provided as aforesaid, he thereby obtained the copyright in the United States for said book or other article, to wit, for said photograph, in due form of law, and there was granted and secured to him, said plaintiff, and that he had the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same for the term of twenty-eight years from the said time of recording the title thereof, to wit, from the 14th day of January, A. D. 1882.

Sixth. And the plaintiff further sheweth that he did duly give the notice of his said copyright as required by the Revised Statutes of the United States and the act amending the same by inscribing upon some visible portion of the several copies of every edition published of said photograph, by inscribing upon some visible portion of the substance upon which were mounted the several copies of every edition published of said photograph, upon the face or front thereof, the following words, to wit, "Copyright, 1882, by N. Sarony."

Seventh. And the plaintiff further sheweth that thereupon and ever since he obtained said copyright as aforesaid he has been the owner thereof and has expended large sums of money in obtaining the aforesaid privilege from said Wilde and in making and publishing the said copyright photograph, and is entitled to all the benefits and advantages of the same; that he made sufficient numbers of said copyrighted photograph and had and has the same for sale to the public at a reasonable price, and is and
18 was able and desirous of supplying the public therewith, and is entitled to receive the profits to be derived from the exclusive and sole liberties so to him secured as aforesaid, and that prior to the unlawful acts of the defendants hereinafter set forth he made great gains and profits by his said copyright and the publication and vending of the said copyrighted photograph.

Eighth. And the plaintiff further sheweth upon information and belief that while he, the said plaintiff, was lawfully in possession of his aforesaid rights and liberties, and in the receipt of the gains and profits of his said photograph, copyrighted as aforesaid, the said defendants, The Burrow-Giles Lithographic Company, who are engaged in the business of lithographing and printing in the city of New York as aforesaid, well knowing the premises and the rights so secured to the plaintiff, and without the consent of the plaintiff, the proprietor of the copyright, first obtained in writing, signed in presence of two or more witnesses, and within two years next before the commencement of this action, to wit, since the 20th day of January, A. D. 1882, and after the recording of the title of the said photograph as aforesaid, and within the term limited, to wit, within twenty-eight years from recording the title thereof as aforesaid, did, within said city of New York, and within the United States, engrave, etch, work, copy, and print, either in whole or in part, or by varying the main design with intent to evade the law, great numbers, to wit, eighty-five thousand copies, of said copyright photograph, one of which copies is hereto annexed, marked "Exhibit B, April 14, 1882," and made a part hereof, and, knowing the same to be so printed, did sell, or did expose to sale, great numbers, to wit, eighty-five thousand copies, thereof, all at the said city of New York, and within said southern district of New York, and within the United States, all contrary to the statute in such case made and provided, contrary to section 4952 and section 4965 of the Revised Statutes of the United States, and to the great damage of the plaintiff, whereby and by force of the statute the said defendants forfeited to the plaintiff, the proprietor of the said copyright, all the plates on which the same were copied as aforesaid.

And that by reason of the premises the said defendants also further forfeited to the plaintiff, the proprietor of said copyright, every sheet thereof, to wit, of the above said eighty-five thousand copies, either copied or printed.

And that by reason of the premises the said defendants also further forfeited one dollar for every sheet of the same found in their possession, either printed, printing, copied, or exposed for sale, and the plaintiff avers that there were so found in the defendants' possession at the time of the commencement of this suit ten of such copies, whereby there accrued to the said plaintiff the sum of ten dollars, one-half thereof to the plaintiff and the other half to the use of the United States, for which said sum of ten dollars the plaintiff claims judgment against the defendants.

19 Wherefore the plaintiff demands judgment against the defendants appropriate to the facts set up in this complaint, and for relief accordingly, with costs.

GUERNSEY SACKETT,
Plaintiff's Attorney, 21 *Park Row, New York, N. Y.*

A. T. GURLITZ, *Of Counsel.*

NOTE.—The exhibits mentioned in the complaint may be seen in the office of Augustus T. Gurlitz, of counsel, with plaintiff, 32 Park Place, New York, N. Y.

(Endorsed:) Circuit court of the United States, southern district of New York. Napoleon Sarony, plaintiff, vs. The Burrow-Giles Lithographic Company, defendant. Complaint. Guernsey Sackett,
20 pl'ff's attorney, 21 Park Row, New York, N. Y. A. T. Gurlitz, of counsel.

Due service admitted.
N. Y., May 25, '82.

STINE & CALMAN,
Def'ts Att'ys.

U. S. circuit court. Filed Apr. 21, 1883. Timothy Griffith, clerk.

21 Circuit court of the United States for the southern district of New York, in the second circuit.

NAPOLEON SARONY, PL'FF,
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY,
def'ts.

The defendant herein, by Stine & Calman, its attorneys, answering the complaint herein, alleges—

I. That the statute under which plaintiff claims herein, to wit, the Revised Statutes of the United States, § 4952, is unconstitutional and void, in so far as it grants copyright protection to photographs and negatives thereof, and that therefore no cause of action exists herein in favor of plaintiff against defendant.

II. That the notice of copyright inscribed by plaintiff upon said photograph, to wit, "Copyright, 1882, by N. Sarony," does not
22 comply with the terms and requirements of § 4962 of the Revised Statutes of the United States, and Chapter 301 of the Laws of 1874 of the United States, in that the name of plaintiff is not inscribed in said notice as required by law, and that therefore no cause of action exists herein in favor of plaintiff against defendant.

III. Defendant denies paragraph numbered 8 of both causes of action set up in the complaint, in so far as the acts of the defendant therein alleged as charged to be a violation of plaintiff's copyright, this defendant insisting that for the reasons above stated the plaintiff has not acquired the copyright for said photographs.

IV. Defendant admits all of paragraph two in both causes of action,

except that defendant alleges that the terms "author," "inventor," "designer," "invention," "design," and "composition," as used therein,
23 are technical terms used in art to describe the various acts therein set forth as having been performed by plaintiff. And defendant further alleges that such acts do not make plaintiff such an author, inventor, or designer, nor make such photographs such an invention, writing, or discovery as can be protected by copyright legislation under the Constitution of the United States.

V. Defendant, further answering, admits all other allegations in the complaint, except that by reason of above-mentioned causes defendant alleges that plaintiff has never obtained a valid copyright on the photographs herein alleged to have been copyrighted.

Wherefore defendant asks that the complaint herein be dismissed, with costs.

STINE & CALMAN,
Def'ts Att'y, 234 Bdway, N. Y. City.

24 (Endorsed:) Circuit court of the U. S., southern district of New York. Napoleon Sarony, pl'ff, vs. The Burrow-Giles Lithographic Company. Answer.

Due service admitted.
June 14, '82.

GUERNSEY SACKETT,
Pl'ff's Att'y.

U. S. circuit court. Filed Apr. 21, 1883. Timothy Griffith, clerk.

25 U. S. circuit court.

NAPOLEON SARONY
vs. } 129.
THE BURROW-GILES LITHOGRAPHIC COMPANY.

It is hereby stipulated that a jury herein be waived by consent.
N. Y., April 16, '83.

STINE & CALMAN,
Def'ts Att'ys.
GUERNSEY SACKETT,
Pl'ff's Att'ys.

(Endorsed:) U. S. circuit court. Napoleon Sarony vs. The Burrow-Giles Lithographic Co. Consent waiving jury. U. S. circuit court. Filed April 16, 1883. Timothy Griffith, clerk.

26 Circuit court of the United States southern district of New York.

NAPOLEON SARONY, PLAINTIFF,
vs. } At law.
THE BURROW-GILES LITHOGRAPHIC COMPANY, defendant.

It is hereby stipulated between the parties that the only defenses to be tried in this suit are:

1st. That the statute in so far as it grants copyright protection to photographs is unconstitutional.

2d. That the plaintiff has not complied with the requirements of the statute in that *that* he has not printed the full name "Napoleon Sarony" in his notice of copy right on the photographs.

3d. That making a photograph does not constitute such an author, inventor, or designer, nor is a photograph such an invention, writing,
27 or discovery, as can be protected by copyright legislation under the Constitution of the United States.

It is further stipulated that if the above questions are decided against the defendant judgment shall be entered for the plaintiff for six hundred dollars ($600.00) on the first cause of action, and for ten dollars ($10.00) on the second cause of action against the defendant, such judgment to have the same force and effect as though the suit had been regularly tried before a jury.

There are to be no costs to either party as against the other in this court.

N. Y., April 12, '83.

GUERNSEY SACKETT,
Pl'ffs Attorney.
STINE & CALMAN,
Def'ts Att'ys.

28 (Endorsed:) Circuit court of the United States southern district of New York. Napoleon Sarony, pl'ff, vs. The Burrow-Giles Lithographic Company, defendant. Stipulation. U. S. circuit court. Filed Apr. 21, 1883. Timothy Griffith, clerk.

29 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Saturday the 21st day of April, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The honorable Alfred C. Coxe, judge.

NAPOLEON SARONY
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY.

On motion of A. T. Gurlitz, esqr., counsel for the plaintiff in the above-entitled action, ordered trial.

Counsel for the respective parties hereto file a written consent waiving a jury, and submitting the issues herein to be passed upon by the court without the intervention of a jury.

Evidence for the plaintiff:

Pl'ff's exhibits Nos. 1, 2.

Agreed statement of facts.

Evidence for the defendant:

Agreed statement of facts.

Mr. Gurlitz is heard in behalf of the plaintiff.

29½ David Calman, esq., of counsel for the defendant, is heard on behalf of the defendant.

C. A. V.

30 Circuit court of the United States, southern district of New York.

NAPOLEON SARONY)
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY.)

Guernsey Sackett and A. T. Gurlitz for the plaintiff; Stine & Calman and D. Calman for the defendant.

COXE, *J.*

This is an action to recover—pursuant to section 4965 of the Revised Statutes—for the infringement of a copyright of a photograph of Oscar Wilde.

Two defenses are interposed:

First. That the act securing copyright protection to photographs is unconstitutional.

Second. That the plaintiff in printing upon the photograph the initial letter of his Christian name, N., instead of the name itself, Napoleon, has not given the notice required by the statute.

Article 1 section 8 of the Constitution vests in Congress the power to make laws "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclu-
31 sive right to their respective writings and discoveries."

Upon the authority of this constitutional grant Congress extended, or assumed to extend, copyright protection to—

"Any citizen * * * who shall be the author, inventor, designer, or proprietor of any * * * photograph or negative thereof." (Sec. 4952, R. S.)

The contention of the defendant, briefly stated, is this: That there was no constitutional warrant for this act that a photographer is not an author, and a photograph is not a writing.

The court should hesitate long, and be convinced beyond a reasonable doubt, before pronouncing the invalidity of an act of Congress.

The argument should amount almost to a demonstration. If doubt exists the act should be sustained. The presumption is in favor of its validity.

This has long been the rule—a rule applicable to all tribunals, and particularly to courts sitting at nisi prius.

Were it otherwise, endless complications would result, and a law which in one circuit was declared unconstitutional and void might in another be enforced as valid.

The result of a careful consideration of the learned and exhaustive briefs submitted, and of such further research and examination as time has permitted, is, that I do not feel that clear and unhesitating conviction which should possess the mind of the court in such cases.

Many cogent reasons can be, and have been, urged in favor of the validity of the statute.

It is, however, sufficient for the purposes of this case to say that in the judgment of the court the question is involved in doubt.

This view is sustained by a recent decision of the judges of the eastern district of Pennsylvania, where the precise question was under consideration.

32 The case, Sharpless v. Thornton, is not yet reported, but the facts may be found in Schreiber v. Sharpless, 6 Fed. Rep., 175, where there was a controversy evidently growing out of the same transaction.

Regarding the other defense above stated I have little doubt.

The object of the statute was to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright.

It would be too narrow a construction to say that the plaintiff, when he placed "N. Sarony" upon the card, did not comply with the terms of the statute requiring "the name of the party" to be placed there.

If the letter of the law is not violated and its object accomplished it is enough.

The strict technical rules of pleading in the criminal courts furnish but slight analogy for the guidance of the court in determining what interpretation shall be given to the statute, even though penal in character.

The English courts, construing an act very similar in terms, have frequently upheld notices of copyright obnoxious to all of the defendant's criticisms.

Although innumerable notices have in this country been worded in the precise form adopted by the plaintiff, and many of these copyrights and notices have been the subject of judicial investigation, the precise question here presented, though it might have been raised, has not apparently been decided.

No American authority has been cited by counsel or found by the court.

It follows that the plaintiff is entitled to judgment pursuant to the terms of the stipulation.

(Endorsed:) United States circuit court, southern district of New York. Napoleon Sarony vs. The Burrow-Giles Lithographic Co. Decision U. S. circuit court. Filed June 5th, 1883. Timothy Griffith, clerk.

33 *Findings.*

Circuit court of the United States, southern district of New York.

NAPOLEON SARONY, PLAINTIFF,
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY, defendant.

This action coming on to be tried before me at the April term, 1883, of this court, and the parties having duly waived a jury, now, upon the summons, complaint, and answers, and the exhibits marked "Exhibit A, April 14, 1882," "Exhibit B, April 14, 1882," mentioned in the complaint, and in evidence before me, and the exhibits marked "Pl't'ff's Exhibit 1, Apl.

21, 1883, H. H. M.," and "Pl'ff's Exhibit 2, April 21, 1883, H. H. M.," and the stipulation dated N. Y., April 12, 1883, signed by the attorneys for the respective parties, all in evidence before me, and after hear-
34 ing Mr. Gurlitz, counsel for the plaintiff, and Mr. Calman, counsel for the defendant, and upon due consideration had, I find as matters of fact—

1. That at the times mentioned in the complaint Napoleon Sarony, the plaintiff, was a citizen of the United States and was a resident in the United States, and that he resided and carried on business in the city of New York, in the county of New York, and State of New York.

2. That the plaintiff was and had been for many years engaged in said city of New York in the photograph business, under the name of "Sarony," and that he was and is known by that name, and that it is a general custom in the photograph business to use the surname alone.

3. That the plaintiff, about the month of January, 1882, under an agreement with Oscar Wilde, became and was the author, inventor, designer, and proprietor of the photograph in suit, the title of which is "Os-
35 car Wilde No. 18," being the number used to designate this particular photograph and of the negative thereof; that the same is a useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same at his place of business in said city of New York, and within the United States, entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit, Exhibit A, April 14, 1882, and that the terms "author," "inventor," and "designer," as used in the art of photography and
36 in the complaint, mean the person who so produces the photograph.

4. That the plaintiff duly complied with all the requirements of the law to secure the copyright to his said photograph, "Oscar Wilde No. 18;" that before the publication of said photograph, and on the 14th day of January, 1882, the plaintiff duly delivered at the office of the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said photograph, and duly paid the fee required by law for recording the same, and that the Librarian of Congress did duly record the name of such copyright photograph, as required by law, and that within ten days from the publication thereof the plaintiff did duly deliver at the office of the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright photograph, all as required by law.

5. That the plaintiff duly gave the notice of his copyright required by law, by inscribing upon some visible portion of the sub-
37 stance upon which were mounted the several copies of every edition published of said photograph, upon the face or front thereof the words "Copyright, 1882, by N. Sarony."

6. That the defendant, The Burrow-Giles Lithographic Company, is a corporation duly organized under the laws of the State of New York, carrying on the business of manufacturing labels, show-cards, chromos, and lithographic and color printing of every description, in the city of New York and State of New York.

7. That the defendant, The Burrow-Giles Lithographic Company, after the recording of the title of said photograph, "Oscar Wilde, No. 18," in the office of the Librarian of Congress, and within twenty-eight years therefrom, within the term limited, and within two years next before the
38 commencement of this action, between January 20, 1882, and April 14, 1882, when this action was commenced, without the consent of the plaintiff, the proprietor of the said copyright, first obtained in writing, signed in presence of two or more witnesses, did, at said city of New York and within the United States, engrave, etch, work, copy, and print eighty-five thousand copies like the print marked "Exhibit B, April 14, 1882," the same being copies of the whole of said copyright photograph "Oscar Wilde, No. 18," and did sell and expose to sale the same in said city of New York and within the United States, and that thevalue thereof and of the plates on which the same were copied was and is ten hundred and ten dollars.

8. That at the commencement of this action, on the 14th day of April, 1882, there were found in the possession of the defendant, The Burrow-Giles Lithographic Company, ten printed sheets of the said
39 eighty-five thousand copies like Exhibit B, April 14, 1882, copies of such copyright photograph, "Oscar Wilde, No. 18."

I find as conclusions of law:

1. That Napoleon Sarony, the plaintiff, is the author, inventor, designer, and proprietor of the photograph and negative thereof the title of which is "Oscar Wilde, No. 18."

2. That Napoleon Sarony, the plaintiff, duly complied with all the requirements of law to obtain the copyright to said photograph and negative thereof, and had and has the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same for the term of twenty-eight years from January 14, 1882, pursuant to the Revised Statutes of the United States, title LX, chapter three.

3. That the statutes of the United States authorizing copyright protection to photographs and negatives thereof are not in conflict with the Constitution of the United States.

40 4. That Napoleon Sarony, the plaintiff, duly gave the notice required by law of his said copyright, pursuant to the Revised Statutes of the United States, title LX, chapter three, and the acts amending the same, and that said plaintiff is entitled to maintain this action for the infringement of his said copyright.

5. That the defendant, The Burrow-Giles Lithographic Company, forfeited to the plaintiff, Napoleon Sarony, the proprietor, every sheet of the aforesaid eighty-five thousand copies like Exhibit B, April 14, 1882, copies of said copyright photograph, "Oscar Wilde, No. 18," and the plates on which the same were copied, and that the plaintiff is entitled to judgment on the first cause of action set up in the complaint, and on the stipulation herein, for six hundred dollars against the defendant.

6. That the defendant, The Burrow-Giles Lithographic Com-
41 pany *Company*, further forfeited one dollar for every of the ten sheets like Exhibit B, April 14, 1882, so as afore-said found in the possession of the defendant, one-half thereof to the plaintiff, the proprietor, and the other half to the use of the United States, and that the plaintiff have judgment accordingly on the second cause of action set out in the

complaint, and on the stipulation herein, for said ten dollars against the defendant.

Judgment is therefore rendered for the plaintiff, Napoleon Sarony, and against the defendant, The Burrow-Giles Lithographic Company, for the sum of six hundred dollars, on the first cause of action in the complaint mentioned, and for the sum of ten dollars on the second cause of action in the complaint mentioned, one-half of said ten dollars
42 to the plaintiff and one-half of said ten dollars to the use of the United States, according to the Revised Statutes of the United States.

ALFRED C. COXE.

JUNE 11TH, 1883.

(Endorsed:) Circuit court of the United States, southern district of New York. Napoleon Sarony, plaintiff, vs. The Burrow-Giles Lithographic Company, defendant. Findings. Guernsey Sackett, plaintiff's attorney, 21 Park Row, New York, N. Y.

43 Circuit court of the United States, southern district of New York.

NAPOLEON SARONY, PLAINTIFF,
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY, defendant.

The issues in this action having been brought on for trial by the court, at the jury term of this court, held in the city of New York, in said southern district of New York, on the first Monday of April, 1883, and a jury having been duly waived, and the issues having been duly tried by the court without a jury, and a decision having been duly rendered for the plaintiff and filed, and the findings having been duly made and filed:

Now, on motion of A. T. Gurlitz, counsel for the plaintiff, it is adjudged that Napoleon Sarony, said plaintiff, recover of the Burrow-Giles
44 Lithographic Company, said defendant, the sum of six hundred dollars in the first cause of action in the complaint mentioned and that said plaintiff recover of said defendant the further sum of ten dollars in the second cause of action in said complaint mentioned, one-half of said ten dollars to the plaintiff, and one-half of said ten dollars to the use of the United States, according to the Revised Statutes of the United States.

Judgment signed this 12th day of June, 1883.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) Circuit court of the United States, southern district of New York. Napoleon Sarony, plaintiff, vs. The Burrow-Giles Lithographic Company, defendant. Judgment. Guernsey Sackett, plaintiff's

attorney, 21 Park Row, New York, N. Y. 3.15 o'ck. U. S. circuit court. Filed Jun' 12, 1883. Timothy Griffith, clerk.

45 { SEAL OF THE LIBRARIAN OF CONGRESS. }

LIBRARY OF CONGRESS,
No. 684, N. Copyright Office, Washington, to wit:

Be it remembered that on the 14th day of January, anno Domini 1882, N. Sarony, of New York, has deposited in this office the title of a photograph, the title or description of which is in the following words, to wit:

OSCAR WILDE, No. 18,

The right whereof he claims as proprietor, in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

2 copies of the above publication deposited Jan'y 14, 1882.

46 OFFICE OF THE LIBRARIAN OF CONGRESS,
Copyright Office, Washington, D. C.

I, A. R. Spofford, Librarian of Congress, do hereby certify that I have compared the annexed copy of the record of the photograph Oscar Wilde, No. 18, with the original record in this office, and that it is a correct transcript therefrom and of the whole of the original.

In witness whereof, I have hereunto set my hand and affixed the seal of my office this 21st day of March, A. D. 1883, at Washington, D. C.

{ SEAL OF THE LIBRARIAN OF CONGRESS. } A. R. SPOFFORD,
Librarian of Congres

(Endorsed:) Pl'ff's Exhibit 1. April 21, 1883. H. H. M. U. S. circuit court. Filed Apr. 21, 1883. Timothy Griffith, clerk.

47 [Librarian of Congress (cut of a book), copyright office, United States of America.]

LIBRARY OF CONGRESS,
Washington, Jan. 14, 1882.

N. SARONY, *New York:*

The undersigned hereby acknowledges the receipt of two copies of photograph, Oscar Wilde (No. 18), transmitted by you to this Library, in conformity with the laws of the United States respecting copyrights.

Very respectfully,

{ SEAL OF LIBRARIAN OF CONGRESS. } A. R. SPOFFORD,
Librarian of Congress.

OFFICE OF THE LIBRARIAN OF CONGRESS,
Copyright Office, Washington, D. C.

I, A. R. Spofford, Librarian of Congress, do hereby certify that the annexed acknowledgement of the receipt of the two copies of the photo-

graph mentioned therein was made at this office, and is in the
48 form in use at and according to the practice of this office.

In witness whereof I have hereunto set my hand and affixed the seal of my office this 21st day of March, 1883, at Washington, D. C.

{ SEAL OF LIBRARIAN OF CONGRESS. } A. R. SPOFFORD,
Librarian of Congress.

(Endorsed:) Pl'ff's Exhibit 2. April 21, 1883. H. H. M. U. S. circuit court. Filed April 21, 1883. Timothy Griffith, clerk.

49 Circuit court of the United States, southern district of New York.

NAPOLEON SARONY, PLAINTIFF,
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY, defendant.

It being represented that a review of the judgment in the above cause is about to be had on writ of error in the Supreme Court of the United States, and it appearing proper to me that the original pictures used on the trial and now on file in the clerk's office of this court should be inspected by the Supreme Court of the United States on the hearing of such writ of error, it is ordered that the clerk of the circuit court of the United States for the southern district of New York send up with the record in this cause, to be sent to said Supreme Court, the photograph and the print mentioned in the complaint and findings herein as Exhibit A, April 14, 1882, and Exhibit B, April 14, 1882, for inspection by the Supreme Court of the United States, and upon the determination of the proceed-
50 ings in said Supreme Court let such exhibits be returned to the clerk of the circuit court of the United States for the southern district of New York.

Sept. 21, 1883.

ALFRED C. COXE.

We consent to the above.

GUERNSEY SACKETT,
Pl'ff's Attorney.
STINE & CALMAN,
Def't's Att'ys.

(Endorsed:) U. S. circuit court. Filed Sep. 25, 1883. Timothy Griffith, clerk.

(Here follow Exhibits A and B, 1 photograph and 1 lithograph, marked pages 51 and 52.)

53 U. S. Supreme Court.

THE BURROW-GILES-LITHOGRAPHIC COMPANY, pl'ff in error,
vs.
NAPOLEON SARONY, DEF'T IN ERROR.

Assignment of errors.

The plaintiff in error herein assigns as errors.

First. That the court erred in finding that the Revised Statutes of the

United States, Title LX, chapter 3, § 4952 are constitutional & valid in so far as they grant copyright protection to photographs & negatives thereof.

Second. That the court erred in finding that Napoleon Sarony, the defendant in error, duly complied with the laws of the United States of 1874, passed June 18th of that year, regulating copyrights by inscribing on the photographs herein "copyright 1882, by N. Sarony."

Wherefore plaintiff in error prays that the judgment herein be set aside & reversed for manifest error, & will ever pray, &c.

LEWIS SANDERS,
Counsel for Pl'ff in Error, Temple Court, New York City.

54 (Endorsed:) U. S. Supreme Court. The Burrow-Giles Lithographic Company, pl'ff in error, vs. Napoleon Sarony, def't in error. Assignment of errors. Lewis Sanders, counsel for pl'ff in error, Temple Court, room 104, N. Y. City.

Due service of within papers hereby admitted, New York, September 10, 1883.

W. C. WITTER,
Attorney for Def't in Error.

U. S. circuit court. Filed Sep. 19, 1883. Timothy Griffith, clerk.

55 *Joinder in error.*

Supreme Court of the United States.

THE BURROW-GILES LITHOGRAPHIC COMPANY, plaintiff in error,
vs.
NAPOLEON SARONY, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in October term, in the year of our Lord one thousand eight hundred and eighty-three, the said Napoleon Sarony, by William C. Witter, his attorney, freely comes here into court, and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, etc.

W. C. WITTER,
Attorneys for Defendant in Error.

56 (Endorsed:) Supreme Court of the United States. The Burrow-Giles Lithographic Company, plaintiff in error, vs. Napoleon Sarony, defendant in error. Joinder in error. William C. Witte, attorneys for def't in error, 32 Park Place, New York.

57 Circuit court of the United States of America for the southern district of New York, in the second circuit.

NAPOLEON SARONY, PLAINTIFF,
vs.
THE BURROW-GILES LITHOGRAPHIC COMPANY, defendant.

Know all men by these presents that we, The Burrow-Giles Lithographic Company, of the city, county, and State of New York, Oscar L. Richard, of New York, and Henry Heubach of New York, are held and firmly bound unto Napoleon Sarony, of the city, county, and State of New York, in the sum of twelve hundred and twenty dollars, lawful money of the United States of America, to be paid to the said Napoleon Sarony, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the day of , one thousand eight hundred and eighty-three.

Whereas lately at a session of the circuit court of the United States for the southern district of New York, in the second circuit, in a suit
58 depending in said court between the above-named Napoleon Sarony, plaintiff, and the above-named The Burrow-Giles Lithographic Company, defendant, a final judgment was, on or about the 12th day of June, 1883, duly rendered in favor of the said plaintiff, and against the said defendant; and the said defendant, The Burrow-Giles Lithographic Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Napoleon Sarony citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said The Burrow-Giles Lithographic Company shall prosecute the said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in
59 full force and virtue.

OSCAR L. RICHARD. [SEAL.]
HENRY HEUBACH. [SEAL.]

Sealed and delivered and taken and acknowledged this first day of August, 1883, before me.

ARTHUR LEDERER,
Notary Public, N. Y.

UNITED STATES OF AMERICA,
Southern District of New York,
County and State of New York, ss:

Oscar L. Richard and Henry Heubach, the sureties in the foregoing bond named, being each duly and severally sworn, depose and say, and each for himself says, that the said Oscar L. Richard is a resident of the State of New York, residing at N. Y. City, and a householder in said State, and that the said Henry Heubach is a resident of the State of New York, re-

siding at Brooklyn, N. Y., and is a householder in said State, and that each of them is worth the sum of twelve hundred and twenty dol-
60 lars over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

OSCAR L. RICHARD.
HENRY HEUBACH.

Sworn to before me this first day of August, 1883.

ARTHUR LEDERER,
Notary Public, N. Y.

(Endorsed:) U. S. circuit court. Napoleon Sarony vs. The Burrow-Giles Lithographic Company. Dated , 18 . Bond for damages and costs in writ of error.

Bond allowed and approved Aug. 7, '83.

ADDISON BROWN.

U. S. circuit court. Filed Aug. 9, 1883.

TIMOTHY GRIFFITH, *Clerk.*

61 UNITED STATES OF AMERICA, *ss:*

To Napoleon Sarony, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-three, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Burrow-Giles Lithographic Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, August 9th, 1883.

ADDISON BROWN.

62 (Indorsed:) U. S. Supreme Court. The Burrow-Giles Lithographic Company, plaintiff in error, against Napoleon Sarony, defendant in error. Citation. Lewis Sanders, counsel for pl'ff in error. Temple Court, room 100, N. Y. City.

(Stamp:) U. S. circuit court. Filed Sept. 19, 1883. Timothy Griffith, clerk.

Due service of within papers hereby admitted.
New York, September 10, 1883.

W. C. WITTER,
Attorney for Def't in Error.

(Indorsement on cover:) No. 1071. The Burrow-Giles Lithographic Company, plaintiff in error, vs. Napoleon Sarony. S. New York C. C. U. S. Filed 9th October, 1883.

111-53

SUPREME COURT OF THE UNITED STATES.

THE BURROW-GILES LITHOGRAPHIC COMPANY,
Plaintiff in Error.

vs.

NAPOLEON SARONY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

DAVID CALMAN,
Of Counsel.

LEHMAIER & BRO. Print, 15, 17, Fulton Street, N. Y.

Second.—That it decided that Sarony, by placing on the photograph herein of Oscar Wilde the words, "Copyright, 1882, by N. Sarony," complied with the requirements of Section 4,962, of the Revised Statutes of the United States, and of Chapter 301, Laws 1874.

HISTORY OF COPYRIGHT LEGISLATION.

I. The law of copyright, in published works, arises from the old laws protecting the rights of the writers of books, beginning with the Licensing Act of Charles II., of 1662, which gave what we now call copyright to owners of books printed under Letters Patent, or entered in the Register book of the Company of Stationers, or in the Register book of either of the Universities, the penalty being the forfeiture of the book and 6s. 8d. for each copy, one-half to go to the King, and one-half to the owner. This was followed by the Statute of Anne (1710), known as "8 Anne, c. 19," and was entitled as follows:

"An Act for the encouragement of learning, by vesting the "copies of printed books in the author, or purchasers of such copies, "during the times therein mentioned."

The preamble declares that "printers, booksellers and other per-"sons, have of late frequently taken the liberty of printing, re-"printing and publishing, or causing to be printed, reprinted and "published, books and other writings, to their very great detri-"ment, and, too often, to the ruin of them and their families," and recites that the object of the Act is "to prevent such practices for "the future, and for the encouragement of learned men to compose "and write useful books."

It allowed a copyright for fourteen years, and a renewal of fourteen years, with penalties for piracy. This was the law of the colonies in 1776, and from this Act springs all American legislation on copyright.

II. The first legislation of the United States on the subject of copyright appears to be the law of Connecticut, of January, 1783, which protects the "writings of men of learning and genius, etc."

Following this came the Statute of Massachusetts, of March 17th, 1783, called "an Act for the purpose of securing to authors

"the exclusive right and benefit of publishing their literary pro-
"ductions for twenty-one years."

The preamble says: "Whereas the improvement of knowledge, "the progress of civilization, the public weal of the community and "the advancement of human happiness, greatly depended on the "efforts of learned and ingenious persons in the various arts and "sciences, as the principal encouragement such persons can have "to make great and beneficial exertions of this nature must exist "in the legal security of the fruits of their study and industry to "themselves, and as such security is one of the natural rights of "all men, their being no property more peculiarly a man's own "than that which is produced by the labor of his mind, therefore "to encourage learned and ingenious persons to write useful books "for the benefit of mankind.

"Be it enacted, that all books, treatises and other literary "works, &c., &c.," protecting the above named books, &c.

In 1785 Virginia followed in Chapter 6, Laws 1785, by protecting books and pamphlets.

In New York, the "Act to promote literature" was passed April 29th, 1786, the preamble of which reads as follows, to wit: "Whereas it is agreeable to the principles of natural equity "and justice that every author should be secured in receiving the "profits that may arise from the sale of his or her works; and such "security may encourage persons of learning and genius to publish "writings which may do honor to their country and service to man-"kind," "Be it enacted, that the author of any book or pamphlet, "&c., &c."

Thus stood American law of copyright when the constitutional convention met.

In these various Acts we find constantly recurring the words "authors" and "writings," and find that uniformly they are used only of literary productions, of *books*, *pamphlets* and *treatises*.

III. At the Constitutional Convention the Articles of the present Constitution of the United States, on which rests all patent and copyright legislation of Congress, was not the subject of any discussion, and it is from the resolutions presented alone that we can gather the intention embodied in the words of the Constitution, to wit:

"Congress has the power to promote the progress of science and "the useful arts by securing, for limited terms, to authors and

" inventors, the exclusive right to their respective writings and " discoveries."

At the meeting of the Convention held August 18th, 1787, James Madison proposed that there be embodied in the proposed Constitution the following: "Congress shall have power to secure " to LITERARY authors their copyrights for a limited time;" "To " encourage by premiums and provisions the advancement of " useful knowledge and discoveries." And Mr. Pinckney, of South Carolina, proposed to give Congress the power "to grant " patents for useful inventions, and to secure to authors exclusive " rights for a certain time." These resolutions were referred to the Committee of Detail, who had power to change the phraseology, but not the meaning.

Journal of Convention.
5 Elliot's Debates, 247.

On September 5th, 1787, these above-named resolutions were reported back by the Committee of Detail, in the form in which they now appear in the Constitution: "To promote the progress of " science and the useful arts, by securing, for limited times, to " authors and inventors, the exclusive right to their respective " writings and discoveries." This report was adopted nem. con. On September 12th the revised Constitution was reported to the Convention with this clause, and was adopted September 17th, 1787.

5 Elliot's Debates, 285 and *seq.*

We therefore see that when the framers of the Constitution adopted the clause in question, they intended to grant protection by *patent to inventions*, and by *copyright to literary productions*. Until then no protection of this kind had ever been extended either in England or the United States to anything but literary work, and the resolutions which form the basis of this article of the Constitution show clearly that none but literary products were to be protected. *If the Constitution is to be interpreted in the light of the events causing the adoption of this article, any laws of Congress extending copyright protection to photographs are clearly unconstitutional and void.*

The Acts of 1790, and 1831, and 1865.

Acting under this article, Congress, on May 31st, 1790, passed a law granting copyright protection to books, maps and charts, and to no other objects. Many of the members of this Congress were men who had taken part in the Constitutional Convention, and were better fitted than any subsequent body of men, laymen or judges, to truthfully portray in legislation the intent of the words of the Constitution which they themselves had helped to frame. They adhered closely to the old law and the evident intent of this article, and granted this protection only to literary property, not to the results of manual skill and a little judgment. Following the Act of 1790 came that of 1831, which extends the benefit of copyright protection to "authors of a book, map, chart or musical "composition, and to him who shall invent or design any print or "engraving," using the words "of his own design."

Here Congress had still in view, solely the protection of original work, as is seen by the use of the words "author," "invent" and "design," each of which pre-supposes that something new is produced, not a reproduction of something already existing.

— Vide infra —

However, when the Act of 1865 was passed, Congress extended its power much further, and went so far as to protect the reproduction of existing objects, by means which are merely applications of scientific principles, well known and open to everybody who will devote his time to the acquirement of a little skill.

And here it is that a halt must be called.

It is the duty of this Court to declare an Act void when the Constitution fails to give Congress the power to pass the same.

That photographs and negatives are not original works of art, but reproductions of existing objects by application of physical laws, has been recognized by the Courts, and it is essential, before entering more fully on the point at issue, that we cite and quote the cases which have determined this.

In the *Udderzook case*, *76 Pennsylvania State Reports*, page 352 and *seq.*, *Ch. J.* Agnew says:—"It is true the photographs we see "are not the original likeness, their lines are not traced by the "hands of the artist, nor can the artist be called to testify that he "faithfully lined the portrait. They are but paper copies taken "from the original plate, called the negative, made sensitive by "chemicals, and printed by the sunlight through the camera.

"We know that its principles are derived from science; that the "images on the plate, made by the rays of light through the camera, "are dependent on the same general laws which produce the "image of outward forms upon the retina, through the lenses of "the eye.

"The process has become one in general use, so common that "we cannot refuse to take judicial cognizance of it as a proper "means of obtaining correct likenesses."

In *Wood* vs. *Abbott*, *5 Blatchford*, 327, SHIPMAN, *J.*, says:— "The original picture is transferred to a prepared glass plate, "according to the well known practice of photographers. This "copy of the original is called a negative, and as seen in the "medium of transmitted light, the lights and shadows of the "original are reversed. A sheet of prepared paper is then laid "upon the plate, both paper and plate are put into a frame of the "proper size, in which pressure is applied to the paper by appro- "priate means, so as to bring the paper into contact with the plate "throughout its entire surface, and then the plate is exposed to "the light of the sun. The rays of light, transmitted through the "glass, throw the picture on the prepared paper, and fix it there, "in positive light and shadow.

"The rays of light paint or delineate, by chemical action, the "image on the paper, guided by the image on the glass. These "rays paint it, just in the same way in which they paint the nega- "tive on the glass, except that in the latter case they are reflected "from the original, while in this they pass directly through the "transparent plate.

"The image, thrown by the light reflected from the original, "and passed through a camera, produces a negative, and when the "light passes through the transparent negative on to the paper held "in contact with glass, it produces a positive. The only force that "contributes to the formation of the image is the chemical force "of light, operating on a surface made sensitive to its power."

From no Point of View can the Court Uphold the Constitutionality of this Act.

I

The Intention of the Framers of the Constitution.

As we have seen, the English statutes, prior to the Revolution, on the subject of copyright, were intended solely to protect literary works, books, pamphlets, treatises, maps and charts. No mention is made of works of art in any way.

The various States, following the legislation of the mother country, passed copyright laws between 1776 and 1777. In all of these we find that protection is extended only to books, pamphlets and treatises. At that time there was no legislature or legislator who thought it essential or prudent to extend such protection further. *Their object was to promote science and learning, not art.* But when the Constitutional Convention gave unto Congress the powers it now possesses, it added to its prerogatives that of protecting the advance of useful arts. Wise and careful as these men were, and unmindful of the danger arising from loose wording, they took the precaution to limit this power by specifically enumerating the means and method by which this power was to be exercised—"by securing, etc., to authors and inventors, the sole right "to their respective writings and discoveries."

What is meant hereby can be gathered, as aforesaid, only by regarding the resolutions which were the basis of this section. These referred, the ones to patents or inventions, the others to copyrights on literary works. If, therefore, we are to determine the rights of Congress by the intention of the framers of the Constitution, we are driven irresistably to the conclusion that any Act of Congress, which goes further than to patent inventions and copyright literary works, is unconstitutional and void.

No patent is claimed here, and we must therefore find that a photograph is a literary work, in order to allow a copyright thereon—a conclusion so ridiculous that it may be dismissed without further remark.

The only case which can be found in which the question here at issue, or a similar one was raised and determined, is that of *Nottage* vs. *Jackson*, decided by the English Court of Appeal on August 3d, 1883. The judges then held that, as the Parliament cannot pass a void law, the only question before them was, "who "occupies a position in the taking of a photograph most analogous

"to that of the author of a painting, etc." And they decide that the man who actually takes the photograph, arranges the lenses, etc., is the true author, although, as they say, this may not have been the intention of the Parliament, as it compels a photographic firm to calculate not only the skill, but also the longevity of every artist it employs, as on his life depends the continuation of the copyright.

And *Brett, M. R.*, says: "No doubt the idea of a photograph "of the Australian cricketers occurred to one of the plaintiffs, and "he put it into the head of the other. But the man who went to "the oval had to arrange the group, and to put in the plate and ad- "just the lenses. But even he did not do everything; probably "another man got the plate ready, AND AFTER ALL, IT WAS THE "SUN WHICH DREW THE PICTURE."

And *Bowen, L. J.*, says: "If the British Government sent out "an expedition to photograph the spots of the sun, or a transit of "Venus, could it be said that the government would be in any "sense the author of the photographs taken?"

SEE "LAW TIMES" OF AUGUST 11th, 1883.

We see from this language that the decision arrived at in this case was based solely on the necessity of fixing authorship on somebody, as Parliament cannot pass a void law; its laws must be carried into effect; if not literally, then by the doctrines of Cypres. This does not apply here. If it is true that, "AFTER ALL, "IT WAS THE SUN WHICH DREW THE PICTURE," then the sun alone is the author of the same, and our Courts have not only the right, but the duty, to declare void and unconstitutional any law of Congress which is not authorized by the Constitution. They must not seek to make a possible interpretation in order to uphold every law, even if this interpretation is recognized, as in Nottage vs. Jackson, to be one which never entered into the intention of the framers of the law.

This case emphasizes the opinions in the Udderzook case, and Wood *vs.* Abbott, that the true author is the sun—not the photographer.

CAN THIS ACT OF 1865 BE JUSTIFIED UNDER THE WORDS OF THE CONSTITUTION?

Before entering upon the discussion of this, the most important question before us, it will be necessary to advert shortly to the fact that this article covers two widely differing matters—patents

and copyrights. It will materially enlighten the question at issue if we can limit the question of copyright to a part of the article, referring the other to patents; it must be remembered that protection is granted to "authors and inventors for their *respective* "writings and discoveries," and it is clear, from every possible reasonable construction of the English language, that the meaning is, "*authors of writings and inventors of discoveries.*" Any other construction would deprive the word "respective" of its proper force. The former are protected by copyright, the latter by patents. Nor is this merely a conclusion arrived at by a grammatical construction; it is sanctioned by the express words of the Supreme Court of the United States.

In *the Trademark Cases, 10 Otto* (100 U. S.), 93, MILLER, *J.*, delivering the opinion of the Court, says: PATENTS AND COPYRIGHTS "ARE TERMS WHICH HAVE LONG SINCE BECOME TECHNICAL AS RE- "FERRING, THE ONE TO INVENTIONS, THE OTHER TO THE WRITINGS OF "AUTHORS."

Copyright protection is, therefore, limited to the writings of authors, and cannot be extended to the inventions of discoverers nor to the inventions of authors.

There remains for us, therefore, only this question: "Are Photographs the writings of Authors?"

ARE PHOTOGRAPHERS "AUTHORS?"

According to Webster, an author is "a beginner, former, "or first mover of anything; the creator or originator; the com- "poser or writer of a book or work." All these synonyms and definitions presuppose the idea of originality; the idea of one who creates something not yet in existence, one who forms by his own labor. What the framers of the Constitution meant by this word is clearly shown by the fact that they used the very words used frequently before in State Statutes: "authors" and "writings." In every case these had been applied only to writers of books, etc.; never to any other class of persons.

But the Courts of the United States have defined this term so clearly and unequivocally that, for the purposes of interpretation of Statutes and Constitutions, we need no longer look beyond the adjudications directly in point. All the decisions to be cited are decisions which define the word "author," found in this very article of the Constitution, which we are now discussing; they are directly in point, and we need no argument of analogy.

They determine and settle the meaning of this word in this connection beyond power of cavil or doubt.

In Atwill *vs.* Ferrett, 2 Blatchf., 39, it is held that "an author "is one who, by his own intellect, applied to the materials of "his composition, produces an arrangement or compilation new "in itself."

2 Wood C. and M., 23 and 46.
1 Story, 11, Gray *vs.* Russell.
3 Story, 768, Emerson *vs.* Davies.

This, then, is an author. Let us apply these tests to a photographer, and determine thereby whether he is an author.

Does he apply his own intellectual labor to the materials of his composition?

We have seen by the decisions in Wood *vs.* Abbott, and Udderzook case (*supra*), that in photography no intellectual and original labor is required.

It is true, that he who first discovered the hitherto unknown process of taking copies of existing objects through a camera upon the sensitized plate, did apply intellectual labor, and for this he could have obtained a patent. That question is not here involved, but we have only to determine whether a photographer, when he produces a photograph, does generally use his own intellectual labor. The Courts, as we have seen, recognize the fact that the taking of photographs is the work of the chemical forces of light on prepared plates, and that no intellectual labor, or other than the mechanical skill and manual dexterity of the photographer, contributes to the result.

See Woods *vs.* Abbott, 5 Blatch., 327, and *seq.*

"That combination of creative or imitative power and mechanical "skill, by which the artist works out his own conception, or the em- "bodied conception of another, in a fixed form, the prints of which "the law was intended to protect, is not brought into play; no "block or stone is engraved; no figure is drawn, etched, raised or "worked, on any surface from which copies are to be produced "by impression or printed; the image thrown by the light reflected "from the original, and passed through a camera, produces a

"negative, and when the light passes through the transparent neg-"ative on to paper held in contact with glass, it produces a posi-"tive.

"The only force that contributes to the formation of the image "is the chemical force of light operating on a surface made sensi-"tive to its power."

Can stronger language be imagined?

It is true that this case was decided before the Act of 1865 was passed, but every word of it applies to the question here involved. The passing of an Act of Congress extending this protection to photographs does not make any other power the active author of a photograph. No new forces have contributed to the formation of the image since 1865. The power of Congress does not go so far as to revolutionize the laws of physical nature.

Defendant in error, however, claims herein to have "invented" this picture, *i.e.*, he has placed or posed Oscar Wilde before the camera, selected and arranged his costume, the draperies and other accessories in said photograph, arranging Oscar Wilde in a graceful position, arranged and disposed of the light and shade, suggested the desired expression.

Granted that this is true, does this make Sarony an author? We respectfully submit that it does not. This is plainly apparent from three different points of view.

I. *This is not the production of something new; it is at best a new arrangement of something already extant.*

Sarony did not create Oscar Wilde, although he may have placed him in the position we see in the photograph. In Jollie *vs.* Jacques, 1 Blatchf., 625, it was held that "the rëarrangement of "a piece of music, but not changing the melody, though re-"quiring, perhaps, very great skill, cannot be copyrighted."

Here, in photography, the *object* photographed is the *melody*, and the "composition or invention" (or arrangement of the limbs and dress of the person) is a rëarrangement, and every word of the above decision applies: it not only applies, but is, in fact, much stronger than is necessary; for it cannot be denied that it requires more skill to rëarrange music, *which is mental work of the rearranger*, than to place a *living, thinking person*, in an attitude to be photographed. As in music, the true object sought after is a melody; so in photography, the true object sought after is a truthful representation of the subject, and putting Oscar Wilde

in a new attitude does not "change the melody"—does not change Oscar Wilde into another person. But in order to expose more fully the ludicrous and fallacious claim of the plaintiff herein, that his photograph is an *invention*, and can therefore be *copyrighted*, we will not only recall the decision of Judge MILLER and the grammatical rules of the English language, which show that invention can only be patented, not copyrighted; but the cases we will now cite will show that this is not the kind of "invention" or "composition" which will be protected in any way.

In Smith *vs.* Elliot, 9 Blatch., 404, WOODRUFF, *J.*, says: "The "law gives no monopoly to industry, to wise judgment, or to mere "mechanical skill, in the use of known means, nor to the product "of either, if it be not new. It is the invention of what is new, "and not comparative superiority or greater excellence in what "was before known, which the law protects as exclusive property." And in Hotchkiss *vs.* Greenwood, 11 How., U. S., 248, and *seq.*, NELSON, *J.*, delivering the opinion of the Court, says, at page 266, that if the object to be patented *shows judgment and skill in the selection and adaptation of materials*, it is not what the law intends to protect.

All Sarony or any photographer can claim is, not a new way of taking photographs, but only judgment in placing the subject, and skill in taking the photograph.

II. If this is an invention, and if persons engaged in an art or trade can, by a mere choice of words, used in a technical sense, bring their products under the meaning and intent of law, then Sarony has mistaken his remedy—he should have *patented* his conception, his *invention*, for, as we have before shown, the power of Congress is limited to granting *copyright to the writings of authors*, and *patents to the discoveries of inventors*.

III. The third and unanswerable objection to Sarony's claim is the admitted fact that no protection can be granted to an idea, a conception, unless it is embodied in a visible form. To obtain a copyright upon any article whatever, the party claiming this protection must be the *author of the visible article on which the copyright is granted*. That is to say, that he must be the person through whose *intellectual labor* the article we see is produced.

A thinker who has solved a question in any branch of learning cannot obtain copyright protection for his ideas, great and valuable though they may be, unless he, by his *own mental work*, embodies the same in some visible form. The choice of words and the arrangement of the sentences are of equally great importance as the ideas themselves.

In Daly *vs.* Palmer, 6 Blatchf., 264–269, cited by defendant in error, it is true that only directions were given how to represent in pantomine a certain series of ideas. But here, also, the element of *originality* entered, and the element of the *expression of the original idea*. "*A written work*," says Judge BLATCHFORD, "consisting wholly of directions set in order for conveying the "ideas of the author on a stage, etc., represented wholly by ac- "tion, is as much a dramatic composition, etc., as if language or "dialogue were used in it to convey some of the ideas." It is not the *idea alone* which is protected, but *the idea expressed and explained in words in the copyrighted work*, though these words are not spoken when the play itself is represented.

But even in this case the learned judge shows clearly, in the language of his opinion, that such a photograph as is here in question is *not such an original as can be copyrighted*. He says: "As in the case of the musical composition, the air is the invention "of the author, and a piracy is committed if that in which the "whole meritorious part of the invention consists is incorporated "in another work, without any material alteration in sequence "of bars, so in the case of the dramatic composition, designed or "suited for representation, the series of events directed in writing "by the author in any particular scene in his invention, and a piracy "is committed if that in which the whole merit of the scene con- "sists is incorporated in another work without any material altera- "tion in the constituent parts of the series of events, or in the se- "quence of the events in the series. *The adaptation of such series "of events to different characters, who use different language from "the characters and language in the first play, is like the adaptation "of the musical air to a different instrument, or the addition to "it of variations or of an accompaniment. The original subject of "invention—that which required genius to construct it and set it in "order—remains the same in the adaptation.* A mere mechanic in "dramatic composition can make such adaptation, and it is a piracy "if the appointed series of events, when represented on the stage,

"although performed by new and different characters, using dif-
"ferent language, is recognized by the spectator through any of
"the senses to which the representation is addressed, as convey-
"ing substantially the same impressions to and exciting the same
"emotions in the mind, in the same sequence or order."

This language is very similar to that of *Jollie* vs. *Jacques*, *supra*. No one can deny or doubt for a moment that to put Oscar Wilde in a particular suit of clothes, and have him cross his legs in any fashion, is naught but a variation or accompaniment; nor that this photograph conveys, and *must convey, as every photograph must*, substantially the same impression and excite the same emotions in the mind of a spectator as any photograph of Oscar Wilde would. It is perfectly clear that the object of such photographs is merely to have a large public sale. This is accomplished not by the accessories of the pose of the party photographed, but by the greater or less fame or notoriety which the subject of the photograph has acquired. Place a common laborer, unknown to fame, in the position in which we see Oscar Wilde herein, with all accessories, can there be any doubt but that such a photograph would be unsaleable? The merit of such photographs lies beyond the so-called invention of the photographer; it lies in the personal and facial qualities of the person represented. He who first puts up for sale such a photograph will reap the benefits; but *priority of appropriation* is an element which this Court will not protect.

See Trademark cases, *infra*.

The painter, engraver and sculptor, cannot obtain a copyright on their ideas before they embody the same in visible form, and here the great difference, the cardinal point of objection, is clearly apparent. To embody the conception of the painter, engraver or sculptor, he must exercise his *imitative* power; the painter's mind is actively engaged; the choice of the correct colors, the mixture of colors, the correct light and shade, the drawing of the outlines—all are acts of an intellectual kind, and it is *his work* which transforms the blank canvas into a thing of beauty.

The sculptor molds the clay, or chisels the marble; guided by his *genius and intellect*, the formless mass assumes a definite shape, and a product of *his* work arises.

The engraver's intellectual powers guide his etching pencil; the light and shade in the engraved plate are products of *his mental*

work, which governs every movement of his tools. But in *photography* nothing of such a nature is required. The subject once arranged, there remains nothing to do but to allow the forces of nature to act.

The light and shade are not produced by the photographer, but the CHEMICAL FORCES OF LIGHT, reflected from the original, produce on the negative the reverse, and again by chemical means the positive is produced. The outlines of the figure, the face and its expression, are delineated by natural means. Not only does the photographer not produce the same in the photograph—nay, more, *he cannot, by any means, change the same* from the exact way in which the subject appears to the eye. *A painter*, however, *not only can, but always does*, change these particulars according to his conception of what ought to be. *The product of his labor is within his control; the photographer's is beyond his power.*

If the claim of defendant in error is correct, then, with more than equal justice, could a literary man send to Washington for a copyright on an idea; he could, *e.g.*, send to the librarian a new formula for solving the theorem that the square of the hypothenuse is equal to the sum of the squares of the other two sides of a right-angled triangle, and by this notice, and all other steps being duly taken, could prevent any one else from writing a book on geometry, and using such formula, although he did not write another word than the formula. If the claim of defendant in error is correct, then the following example would be a logical outcome: if Oscar Wilde, arranged as he is in the picture before us, were to request a painter to make an oil painting, and the painter were to do so, he would be infringing on the rights of defendant in error; nay, more, if plaintiff had so posed Oscar Wilde, and had never taken his photograph, he would have the same rights as he now has; for, as is conceded and adjudicated in Wood *vs.* Abbott, and the Udderzook case (*supra*), his work is done when the subject is posed or "invented," the rest being the work of chemical forces. Following out the above example, if a painter were to step in at Oscar Wilde's request, and paint him as posed, he would be infringing Sarony's rights, although Sarony had never photographed Oscar Wilde; Sarony might, with equal justice, deposit Oscar Wilde himself in the librarian's office, and allow them there to photograph the subject, and then claim that having *invented* Oscar Wilde, as shown in the photograph, he is entitled to a copyright.

But going still further into this view of the matter, the Court must remember that this Statute grants the same protection *to all photographs and negatives.* A photographer may, therefore, claim a copyright upon a photograph of a landscape with equal justice that he claims it on such a picture as the one herein sued upon. There the element of "posing" or "invention" cannot enter; the photographer cannot change either the expression, the pose, or accessories of the natural scene. His claim in this case is based *solely on priority of appropriation*, and this has been held by the United States Supreme Court to be no basis for protection by Congressional legislation.

See Trademark Cases, 10 Otto, *infra.*

Here we again see the vast difference between a painter and a photographer. The painter can *change* the landscape by his own *intellectual labor*; he may introduce persons in the scene, though there be none in reality; he may paint a tree in full bloom, though it be withered; the lake may be represented as calm, though it be troubled and stormy; in his painting, the scene may be brightened by the addition of flowers, though in the original these be wanting.

The painter may change the light so as to convey different impressions; he may put any part of the landscape in the shade or in the light, *according to his volition*, and thus he can represent the same scene in an infinite number of variations, and produce in the mind of the spectator any emotion he may desire to call forth. The light and shade in any picture varies with every painter, his *own mental originality* determining the same; but in the case of a photographer the lights and shades are beyond his power; his camera will reflect only the effect of the sunlight on the scene.

The painter can idealize the reality; under his brush the object represented may assume a thousand different aspects, each representing another thought; and this he does by his volition, without the aid of the object delineated.

The photographer can do nothing of this kind; the camera, acting by UNCHANGEABLE LAWS OF NATURE, represents the scene AS IT IS; *nothing is added, nothing omitted.* His product is limited and governed absolutely by those immutable laws of natural forces which the human mind, by close study and observation, may, perhaps, discover, but can never overcome or destroy.

The painter's, engraver's, or sculptor's product is absolutely independent of these forces; his will and his intellect alone determines the shape his product shall assume. Nor is this all. *The originality of an artist is shown and reflected in his work. The author of a literary work need not attach his name to his book; the style of thought and of expression unmistakeably stamp it as the product of his brain; his individuality lives in his works. And so it is with a painter or sculptor; his works are known to be his because his mind is reflected in his product and show who produced it; his name attached thereto is not as good proof of authorship as the unwritten evidence of his genius. No such fact can be predicated of a photographer. As the Courts have declared, as our knowledge of the art of photography teaches us, all photographs of the same object, taken from the same point of view, will be exactly alike if taken at the same time, under the same conditions of sunlight. The only way to determine who took the photograph is to add the photographer's name.* THIS IS NOT THE ORIGINALITY the law requires. *That unexpressed but ever living stamp of individuality which lives in a true artist's work, and marks it for his own,* IS WHAT THE LAW MEANS BY ORIGINALITY. There can be none such where the direction and result is determined by forces beyond the control of man. If, therefore, it is apparent that this statute grants protection to articles which cannot be protected, and no line is drawn by the statute itself by which to determine which can and which can not be protected, THE WHOLE STATUTE IS VOID.

If this statute, granting copyright protection to all photographs and negatives, therefore necessarily, as we have already shown, ignores the idea of originality,—nay if, as is clear, nearly all photographs, and the very idea of photography negative the idea of originality, how can a photographer be called an author, the essential element of authorship being, as the United States Supreme Court has declared, ORIGINALITY?

It is clear, therefore, that a photographer is not an author, *ergo*, HIS WORK CAN NOT BE COPYRIGHTED.

But we will not stop here: his works are not writings, and if this be so, how can copyright protection be extended to them?

ARE PHOTOGRAPHS "WRITINGS?"

Webster says that a writing is a "thing written or expressed in "letters." This, also, was the sense in which the framers of the

Constitution used this word. They used a word taken from the State and English statutes. There it meant only books, pamphlets, etc. *This a photograph surely is not.*

It seems, however, that Congress, in its construction of this word, has gone further; and, although there has been no judicial interpretation, we are ready to discuss the question at issue on the basis of this wide construction, erroneous though we consider it.

As we have seen at first, only books, pamphlets and treatises were copyrighted—all writings, in the true sense of the word, and the sole writings which the framers of the Constitution had in mind when they adopted the article in question—the sole writings over which Congress can exercise its power of protective legislation, without importing into the word "writing" a meaning which it does not, and cannot, have in the English language.

But even if we go beyond the definitions of this word "writings," as used in ordinary English, and are willing to give it the meaning to which *it seems* the Courts will extend their protection, photographs will not be embraced. Judge MILLER, delivering the opinion in the trademark cases, 10 Otto (100 U. S.), 82 and *seq.*, says: "If we should endeavor to classify it under the head of "writings of authors, the objections are equally strong. And while "the word 'writings' may be liberally construed, as it has been, "to include ORIGINAL DESIGNS for engravings, prints, etc., it is only "such as are original, and are founded in the creative powers of "the mind. The writings which are to be protected are the FRUITS "OF INTELLECTUAL LABOR, embodied in form of books, prints, en- "gravings, and the like."

This is the only definition of the word to be found in the reports of the United States Supreme Court. How does this definition apply to photographs? Is a photograph an original design?

When we consider that the very object of photography is to represent truthfully an object already extant, without any deviation at all from the subject, the answer is clearly "No."

THE BETTER THE PHOTOGRAPH, THE TRUER IS THE LIKENESS; THE LESS IS THE ORIGINALITY OF THE DESIGN.

Is it founded in the creative powers of the mind, or is it the fruit of intellectual labor? The decisions already cited answer these questions decisively in the NEGATIVE. They (photographs) are the result of the operation of the chemical forces of light; the only thing original about them, the only thing founded in the creative powers of the mind, or the fruit of intellectual labor, is

the process of taking them, which can be protected only by patent, and not by copyright.

Looking at this decision more closely, and analyzing it carefully, we see also that, in all the cases cited as "writings," the LABOR OF EMBODYING A THOUGHT in a visible form is the essential characteristic. In a map, chart, painting or engraving, it is not the subject alone which obtains the copyright protection, but the mental work of conceiving the same, or of assimilating the same, followed by the labor of embodying the same in visible form, which labor, in every instance cited, is performed by the party protected. This element does not enter into photographs, as we have shown above; this is solely the work of the chemical forces of light; no brain work is required, no originality, no creative power of the mind. It is impossible that the design be original, for, as a photograph is but a copy, the original must be before extant, not only in substance, but in every minute particular. *Useful as the art may be, it is clearly not one in which originality is an essential element.* A PHOTOGRAPH IS, THEREFORE, NOT A WRITING, AND CANNOT BE COPYRIGHTED.

II.

DOES A PHOTOGRAPH FALL WITHIN THE INTENT OF THE CONSTITUTION?

We have seen that a photograph cannot be copyrighted under the words of the article of the Constitution, under which alone it could possibly be upheld; we will now see whether a copyright of a photograph can be justified under the intent of the article.

This intent can be gathered clearly from the decisions, many of which have been cited before and upon which we need dwell but briefly.

By the preambles to the State Statutes, we see that the matter to be protected must be ORIGINAL. This test has been kept steadily in view by the Courts of the United States, and is still the principal test.

Atwill *vs.* Ferrett, 2 Blatchf., 39.
2 Wood C. and M., 23 and 46.
Jollie *vs.* Jacques, 1 Blatchf., 625.
Gray *vs.* Russell, 1 Story, 11.
Emerson *vs.* Davies, 3 Story, 768.

But the case in which the United States Supreme Court dwelt most fully upon, the intent of this article, and which must remain the test and the touchstone by which the constitutionality of these laws are determined, is the trademark case 10 Otto (100 U. S.), 82 and *seq.*

MILLER, *J.*, delivering the opinion of the Court (p. 94), says as follows—every sentence of which we will analyze and apply to the case in point. He says:

"The ordinary trademark has no necessary relation to invention "or discovery. It is often the result of accident rather than design, "and when, under the Act of Congress, it is sought to establish it "by registration, neither originality, invention, discovery, science "nor art, is in any way essential to the right conferred by that "Act."

Every word of this applies to photographs.

They have no *necessary* relation to invention or discovery; this we have shown above, for every photograph can be copyrighted, although it be but an absolute reproduction of something already extant, *without change of any kind.*

They are sought to be established by mere registration, without regard to originality, invention, discovery, science, or art. Under the statute the copyright protection is conferred upon any photograph of any subject, provided it is registered.

The opinion then continues:

"If we should endeavor to classify it under the head of writings "of authors, the objections are equally strong. In this, as in re-"gard to inventions, ORIGINALITY is required. And while the word "'writings' may be liberally construed, as it has been, to include "original designs for engravings, prints, etc., it is only *such as are* "*original, and are founded in the creative powers of the mind.* "The writings which are to be protected are the fruits of intel-"lectual labor, embodied in the form of books, prints, engravings "and the like."

That photographs do not fall under this definition, we have shown, *supra.*

Udderzook case, 76 Penn. Stat., 352.
Wood *vs.* Abbott, 5 Blatch., 327.

Continuing, the Court says:

"The trademark may be, and generally is, the adoption of some-
"thing already in existence, as the distinctive symbol of the party
"using it."

A photograph, surely, is the reproduction by natural means of something already existing. These words apply more strongly to photographs than even to trademarks. The latter may be, and often are, original creations of the author's imagination and fancy, and are not rarely of true artistic merit. A photograph, however, is *always* a reproduction true to nature—a variation from the original is *impossible* by the very laws of nature which govern its production.

"At common law the exclusive right to it grows out of its use,
"and not its mere adoption. By the Act of Congress, this right
"attaches upon registration. But in neither case does it depend
"upon novelty, invention, discovery, or any work of the brain."

Here, again, every word applies to the case at bar. By the statute, the copyright attaches on registration; novelty, invention, discovery, or work of the brain, is not inquired into nor required. Any photograph of any object may be copyrighted, provided no one else has a prior copyright.

"It requires no fancy or imagination, no genius, no laborious
"thought. It is simply founded on priority of appropriation."

Again applicable verbatim. The very essence of photography denies the possibility of fancy or imagination—truthful representation of existing objects is what it aims at. No genius and no laborious thought is required; nothing but mechanical skill. It is founded simply under priority of appropriation. As the statute reads, if Sarony were to place his camera on the tower of the Belvidere, in Central Park, and take a photograph of the reservoir, he could copyright the same by priority of appropriation. No other photographer could take such a photograph without infringing on his copyright. The element of mental work and originality not entering into the work, if any other photographer were to place his camera in the same position, by the laws of natural science the picture produced would be identical with Sarony's, and his photographs would be infringements on Sarony's.

Is this the original work which Congress can protect, or is it merely prior appropriation which Congress cannot protect?

"If the symbol, however plain, simple, old and well known, has "been first appropriated by the claimant as his distinctive trade-"mark, he may, by registration, secure the right to its exclusive "use."

The above example, *mutatis mutandis*, can be cited here again, and will apply word for word.

The Court then ends its remarks by the following, which again applies to the case at bar:

"While such legislation may be a judicious aid to the common "law on the subject of trademarks, and may be within the com-"petency of legislatures whose general powers embrace that class "of subjects, we are unable to see any such power in the consti-"tutional provisions concerning authors and inventors, and their "writings and discoveries."

This is exactly the position we take. The legislatures of the various States have the undoubted right to bestow protection on photographs, but nothing in the words of the Constitution justifies congressional legislation on the subject; and nothing of what can be gathered from the intent of the framers of the Constitution, as shown by prior legislation, and by the proceedings in the convention; nothing in the intent of the Constitution, as explained by the Courts, can uphold the statute of copyright on photographs.

Throughout the trademark case, the argument of the Supreme Court is based upon the fact that no distinction is made between trademarks in which *originality* enters, and such in which this element does not enter, and that on that account the whole statute is unconstitutional. The same argument applies here; *any and all photographs* can be protected in the same way, and therefore the statute is unconstitutional. It cannot be denied that many trademarks were highly original, and founded entirely on fancy, imagination, and intellectual labor, in their preparation—far more so than the posing of a subject—how much stronger, therefore, is the argument that the statute herein sued upon is unconstitutional.

The judgment of the Court below must therefore be reversed with costs, and judgment for the plaintiff in error directed.

III.

Defendant in error has not complied with the statutory requirements, and the judgment must, therefore, be reversed, even if the statute is constitutional.

Chapter 301, of the Laws of 1874, declares that no person can commence any action for an infringement of copyright, unless he places on some visible portion of the copyrighted article, or on the substance on which the same shall be mounted, the following words, viz: "Entered according to the Act of Congress in the "year ——, by A. B., in the office of the Librarian of "Congress at Washington," or, at his option, "Copyright," together with the year the copyright was entered and the *name* of the party by whom it was taken out; thus: "Copyright 18—, by A. B."

Defendant in error has not complied with these requirements: —he has not placed his name on the photograph in question—he has simply put the initial of his Christian name.

This STATUTE IS A PENAL STATUTE, and must be strictly construed, a principle so well settled that no citation of cases is necessary.

The rule of law, that where a name is required to be inserted in a legal paper, the full name is intended, and not an initial, is universally recognized, and all the cases which are apparently opposed to this rule are, on closer analysis, found to conform to it, as will be shown *infra*.

In NASH *vs.* CALDER, 5 C. B., 178, held that William Henry W. Calder was not a misnomer, but an incorrect description of the defendant, as W. could not be a baptismal name. Modern cases do not go so far, as middle names are now disregarded.

Franklin *vs.* Tallmadge, 5 Johns, 84.

In GERRISH *vs.* THE STATE, 53 Alab., 476, held that "if a man "is indicted by his initials, the jury should be instructed to acquit." Defendant was indicted as F. A. Gerrish, his name being Frank A.

MANNING, *J.*, delivering the opinion, says: "Although F. might "be a person's name, if given as such, yet *if used as an initial* "merely, it is not then a name or intended to be understood as his "name. And as an initial letter, it indicates the name Frederick,

"Ferdinand, or Felix, or any other name beginning with that "letter, as well as Frank. It does not *identify* the person prose- "cuted, as an indictment ought to do. Of course, every one who can "spell correctly and knows a person's name, knows also the initial "letter of it, and can testify that he is well known by those initials. "But they do not thereby become his name. F. is not Frank, H. "is not Henry," etc.

See also to the same effect,

Tweedy *vs.* Jarvis, 27 Conn., 42.
Jones Estate case, 27 Penn St., 336,

Where it was held that if a man NEVER uses any other name than his initial, then it is his name, but not otherwise.

See also Rockwell *vs.* The State, 12 Ohio, 427.
Zellers *vs.* The State, 7 Ind., 659,

Where an indictment for assaulting A. B. Robinson was held bad—as everybody is presumed to have a Christian name—although Robinson swore that he was generally known as A. B., and not as Alexander.

See also Gardner *vs.* The State, 4 Ind., 632.
Smith *vs.* The State, 8 Ohio, 294.
Miller *vs.* Hay, 3 Exch., 14.
Esdaile *vs.* McLean, 15 M. & W., 277–284.

In Miller *vs.* Foley, 28 Barb., 630, held by the Court, all concurring: "We held in Graff *vs.* Mullin (April, 1856), following the "current of authority, that process for the arrest of an individual "must so describe the person intended, that the officers would "know whom to arrest, and the party whose liberty was threatened "might know whether he was bound to submit, and that it was "not sufficient that the person in fact intended was arrested. In "that case *the initial only* of the *Christian name* of the party "was given in the warrant. *That is the rule as well in civil as in "criminal cases* (Griswold *vs.* Sedgwick, 6 Cow., 456; s. c. 1 "Wend., 126; Scott *vs.* Ely, 4 do., 555, etc). The recital in the "warrant of a complaint against the plaintiff cannot aid the de- "fendant. At best it has left it doubtful which was the true "name of the party to be arrested. A party cannot have two "Christian names (Rex. *vs.* Newman, 1 Ld. Raymond, 567)."

See also Crawford *vs.* Slye, 4 Cranch, Cir. Ct., 457.
Gardner *vs.* Kraft, 52 Howard, 499.
Bank of Havana *vs.* Magee, 26 N. Y., 355.

The leading case on this point is FRANK *vs.* LEVIE, 5 Robertson, 600, where ROBERTSON, *Ch. J.*, says: "The law supposes every "one to have two names; one of his family, and the other given "at his baptism, and allows two fictitious names to be inserted, "when either of the real ones are unknown, but does not recog- "nize a separate single letter as a name."

Under these decisions it is therefore apparent that the defendant in error herein, Napoleon Sarony, has not placed his name on the photograph as required by law, and the judgment must therefore be reversed. However, there are some cases, as above stated, apparently in conflict with the above, and we will now analyze these as far as we have been able to find such cases.

In REGINA *vs.* DALE, 15 Jurist, 657, held that a demurrer on the ground that the prisoner was not correctly described, was not well taken, as a single letter may be a name.

So also Lomax *vs.* Landels, 6 C. B., 577.

These cases do not apply to the case at bar. The motion to dismiss the complaint or demurrer is based on a different ground.

Here it is apparent from the complaint that [redacted]'s name is Napoleon Sarony, and the question whether N. by itself could be his [redacted] name, does not arise; nay, is negatived by the complaint.

Gerrish *vs.* The State (*supra*).
Tweedy *vs.* Jarvis (*supra*).
Jones Estate (*supra*).

The cases of Scott *vs.* Soans, 3 East., 111, and Walker & Co. *vs.* Perkins, Dowling & L., 982, hold nothing else than that in the absence of proof, "John, otherwise Jonathan," and "Walker & Company," might be the true names. Here the complaint shows that the true name is "Napoleon," and not "N.".

[redacted] claims to have complied with the requirements of this Act, because [redacted] does business under the name of "Sarony," and not as Napoleon, or N. Sarony.

This claim, however, must appear ridiculous, if we consider that the law never has recognized, and never can recognize, as the true name of a person, any other than the name given him at his birth, unless changed subsequently in conformity with law.

No person can have two names.

See cases *supra*.

Every person has a given name and a surname.

See cases *supra*.

Both of these principles are violated by defendant in error's position, and further than this, the complaint shows that his name is Napoleon Sarony. It is a very usual occurrence for persons to do business under fictitious names, viz.: "N. Y. Milk Co.," or "Brooklyn Pencil Co.," etc., etc., but if such a person sues, he must use his true name, and not his business name.

Bank of Havana *vs.* Magee (*supra*),

which was decided differently, only because the objection was raised too late.

The law of the United States requires the name to be placed on the article, and adds, as example, A. B.

This shows clearly that two names are required, A. and B., and not one, B.; especially so, as this is a penal statute.

Defendant in error may claim that, as the statute uses initials, A. B., he may use his initials. How ludicrous this claim is is shown by carrying out the parallel. *If this be true, he may use only his second initial also, so that N. S. would be sufficient!*

But the untenability of this position is shown more clearly still, if we will but consider that when a copartnership begins an action, it cannot, either under common law practice, nor under any code, sue in the firm name, but all the members of the copartnership must be joined under their individual names; nor can they be sued in the firm name.

The firm name is not the legal name. Could an action be maintained against "Sarony," or a judgment rendered or execution issued against "Sarony?" The case of Gardner *vs.* Kraft (*supra*), shows that such judgment would be invalid.

Defendant in error's Cases.

Thomson vs. *Symonds*, 5 Penn. R., 45, cited by plaintiff, says that it is a question whether an assignee must print his name or no, but does not touch the question here raised.

Newton vs. *Cowie*, 4 Bingham, 234, holds merely that the word "proprietor" or "author" need not be placed on the print; no other question was raised or determined on this point of the name.

STOCKWELL *vs.* U. S., 13 Wallace, 531, does not state, as claims, that a statute of this kind is not penal, but the opinion of the Court merely says that it is remedial as well as penal, and *not exclusively penal.*

GRAVES *vs.* ASHFORD, 2 L. R. C. P., 410, held that to put on the print "Henry Graves and Company" was sufficient, *as the person designated by "and company"* was not a partner, and therefore the "and company" was mere surplusage, and "Henry Graves" being on the print, the rest might be disregarded, said Graves being sole proprietor, and his name being on the print. By inference from the language of the Court, it appears clearly that if Graves had had a partner, the "Henry Graves & Co." would not have been sufficient, but that the full names of all the partners should in that case have been placed on the print—*thus overthrowing 's claim that it is a sufficient compliance with the statute to place the firm name on the print.*

The only cases on which defendant in error can at all rely are *Rock* vs. *Lazrus*, 21 Week. Rep., 210, and *Weldon* vs. *Dicks*, 27 Week. Rep., 639, in which Rock & Co. and Newby & Co., respectively, were held to be sufficient designations. Both of these cases were decided by V. C. Malins, sitting alone, and at best we have here the opinion of one judge on this question, and that of a judge unknown to fame.

Opposed to this opinion are all the cases cited by . These are American cases, well considered, with lengthy and unanswerable arguments, while V. C. Malins does not give any reason whatever for his decision, except that, in his opinion, such designation is sufficient.

The statute here requires the "*name*" to be printed, and this Court must determine solely what the "*name*" of a party is under the laws of the United States.

No case can be found in the reports of any State, or of the United States, which fails to hold that the name of a person consists of two parts:—a given name and a surname. Every case holds that an initial cannot be used in place of the given name unless the party never had any other name than an initial, which is not the case here, as appears on the face of the complaint.

Reasons why the Full Name is Required.

When we consider the reasons for the requirement of the statute that the name of the author be placed on the copyrighted article, it will appear more clearly that neither "N. Sarony" nor "Sarony" is a compliance with this Act.

The true reason is, of course, the *identification* of him who claims the copyright, but under this general head various subdivisions and more particular arguments necessarily appear, and will be considered by us in their relation to the suit at bar.

He who claims a copyright on any article asks for a special protection to be granted under special legislation, and in return therefor, these laws, having in view not only his protection, but also the interests of the community at large, demand that he shows to everybody, and with clearness, who it is that claims this exclusive right.

(*A*).—A copyright is *prima facie* evidence that the person taking it is the author.

Reed *vs.* Cornac, 8 Law Rep. (O. S.), 411.

If the mark or name on the article is "N. Sarony" or "Sarony," is this any evidence who took out the copyright, or does it leave it in doubt whether Nichols, Nancy, Nora or Nathan, &c., Sarony took out the copyright?

Suppose that Nathan Sarony were to sue us for infringing the copyright on the pictures herein sued upon, and were to produce the certificate of the Librarian that "N. Sarony" took out the copyright hereon, what defence could we have if we were not able to procure the proof that it was "Napoleon," and not "Nathan," who was the rightful owner, a proof which it is clear could not always be obtained.

Nathan might obtain judgment for a large amount, and then Napoleon, whose attention until then had not been attracted to the infringement, might sue us, and by the same evidence recover another judgment against us. This example clearly shows how necessary it is to inscribe the full name and not an initial of a name, and still more clearly does it dispose of the [redacted] argument that "Sarony" alone is sufficient, and that the N. a mere surplusage. In the latter case any Sarony, Henry, George, Albert, etc., could recover judgment.

(*B*).—Reversing the example, it is apparent that another reason for the requirement that the name be affixed to the article, arises from the fact that copyrights, unlike patents, are granted without investigation of the right of the claimant to a copyright. It is a mere act of registration. It follows that if the copyright infringes on another's prior right, the latter should bear upon its face such identification of the infringer that the injured party may at once, without further research, know whom to sue for the infringement. This he cannot know if only an initial is used. He must make further research, whether it is Nancy, Nora, Nathan, Nimrod or Napoleon.

(*C*).—We will add but one other illustration. Supposing that the copyright is taken out, as in the case at bar, by an initial, how can anybody, who wishes to make an arrangement with the party entitled to the copyright, to secure the right of publication, determine which Sarony he should apply to?

He might, in *bona fide*, apply to Nathan, who mig[illegible]nt him the privilege, and shortly afterwards find himself a [illegible]lant in several actions for hundreds of thousands of dollars of penalties, brought by Napoleon, Nancy or Nora.

How much stronger are all these objections if, as ~~plaintiff~~ defendant in error *claims, the N. were mere surplusage!! If the words of the statute "A. B." did not mean "A. B." but only "B."!!*

From all these considerations the conclusion is inevitable that ~~plaintiff~~ defendant in error has failed to comply, either with the letter or with the spirit of the legal requirements of this Act.

The judgment of the lower Court must therefore be reversed, with costs, and judgment directed for the plaintiff in error.

Respectfully submitted.

DAVID CALMAN,
of Counsel for plaintiff in error.

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Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1071.

THE BURROW-GILES LITHOGRAPHIC COMPANY,
Plaintiff in Error,

vs.

NAPOLEON SARONY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

AUGUSTUS T. GURLITZ,
Of Counsel.

Supreme Court of the United States.

THE BURROW-GILES LITHOGRAPHIC COMPANY,
Plaintiff in error,

vs.

NAPOLEON SARONY,
Defendant in error.

Brief on the Part of the Defendant in Error.

Only two questions, substantially, arise in this cause:

1st. Is the law constitutional in so far as it secures copyright protection for photographs; or, to state it in another form, can an author, inventor or designer secure his exclusive right to photographs invented by himself, under the copyright act; and

2d. Has the defendant in error given the notice of his copyright which the law requires?

I.

The first question to be considered is the constitutionality of the copyright acts in so far as they grant protection to photographs.

The provisions of the Constitution are the following:

"SECTION 8.

The Congress shall have power:

* * * * * *

8. To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

* * * * * *

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers;"

Construction of the Constitution.

Before entering upon a particular examination of these provisions, the rules governing the construction and interpretation of the Constitution may be considered.

The Constitution partakes of the character of a league as well as of a constitution, strictly so called, and must be so construed, that, as said by Chief Justice Marshall "while the intention of the instrument must prevail, this intention must be gathered from its words, and that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended."

Ogden v. *Saunders*, 12 Wheat. at p. 332.

"Its powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interest should require."

Martin v. *Hunter's Lessee*, 1 Wheat. at p. 326.

The meaning of the Constitution is to be found in its terms, and we are not at liberty to resort to extrinsic facts and circumstances to ascertain what the framers might have intended. Says Chief Justice Marshall, speaking of the Constitution:

"It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which

the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

Sturges v. *Crowninshield*, 4 Wheat. 202–203.

And in another case:

"* * the patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

Gibbons v. *Ogden*, 9 Wheat., 188.

Turning now to the provisions in question, their meaning is apparent—it is to advance or encourage science and useful arts; and this is to be accomplished by *securing* to authors and inventors the *exclusive* right to their respective writings and discoveries.

And to effect this, Congress has power to make all necessary and proper laws.

Meanings of the terms "Authors," "Inventors," "Writings," "Discoveries."

It then becomes important to have a clear understanding of the meaning of the terms "*authors*" and "*inventors*," "*writings*" and "*discoveries*."

Author: He to whom anything owes its origin; originator; creator; maker, first cause.—*Worcester's Dict.*

One who produces, creates, or brings into being.—*Imperial Dict.*

The beginner, former, or first mover of anything; hence the efficient cause of a thing; creator; originator.—*Webster's Dict.*

Also, in a special sense, one who composes or writes a book; the composer of a work, as distinguished from a compiler or translator.—*Webster's Dict.*

Inventor: One who finds out something new; a contriver; one who makes an invention.

Invention: A term employed to designate the conception or the representation of a subject; the selection and disposition of its various parts; and the whole means by which the artist seeks to portray his thoughts. "Among the artists of our time, none have approached Kaulbach in invention." *Fairholt.*—*Worcester's Dict.*

In painting, the finding or choice of the objects which are to enter into the composition of the piece. In poetry it is applied to whatever the poet adds to the history of the subject. In rhetoric the finding and selecting of arguments to prove and illustrate the point in view.—*Imperial Dict.*

The choice and production of such objects as are proper to enter into the composition of a work of art. "Strictly speaking," says Sir Joshua Reynolds, "invention is little more than "a new combination of those images which have "been previously gathered and deposited in the "memory; nothing can come of nothing; he "who has laid up no material can produce no "combinations."—*Brande & Cox's Dict. of Science, Liter. and Art.*

The exercise of the imagination in selecting a theme; or more commonly in contriving the arrangement of a piece; or the method of presenting its parts.—*Webster's Dict.*

Perhaps no better illustration of the use of the term "invention" in art can be found, than in this extract from a Lecture by Prof. W. B. Richmond, on Monumental Painting:

"As I said in the earlier part of my lecture, I say again now, with a definite instance before me, that those who would study monumental art, who would become conversant with its limits and the true boundaries of just taste, must feed, before attempting to advance in hurry to

the greater luxuries of more extended artistic grounds, upon these earliest expressions of the mind of as great a painter as ever lived, whose shortcomings were only of science, whose work is always clear in invention, absolute in taste, right in feeling, whose color for its purpose is quite perfect, and, above all, whose serious and noble design no art ever surpassed. But no hasty observer will get out of the work of Giotto what he may. The quaintness will startle, and the subtlety of human expression is too great to strike at a glance; and the gestures and indications of action relating to the event of the design are too really natural and dignified to be immediately or strikingly apparent. It is essentially work that needs study and sympathy to enjoy and profit by; it is so delicately felt, and so childlike in expression, and, withal, it is always robust in thought. When all the stories expressed by Giotto are made out and understood, when each motive of every figure has been clearly followed, there yet remain many purely physical beauties to be studied and enjoyed—physical beauties that have been but too little recognized. If trouble be taken hands may be found as perfect in beauty as need be (this I mean in the drawing of them); and as for the invention of their actions, it cannot be better, for no greater designer of simple action ever existed than Giotto. And in the drawing of hair Giotto was again remarkable, and will stand comparison with painters of more studied knowledge, while in the design of it none surpass him. The heads, too, throughout the Padua series—especially of the Virgin—are as varied in emotional beauty as can be imagined. Observe this invention. At the Annunciation the Virgin is calm, expectant, and hopeful. Later, anticipation of trouble ages the beautiful countenance without spoiling it. But we find the sob of agony marring it as Christ is led away to Calvary; and physical strength gives way at the Crucifixion—passionate humanity of feeling overrides all ideal feeling; and then, most marvelous touch of all for poetic thought, at the Ascension, the drama being complete, the suffering of her Son over, that early calm of youth—but slightly aged, again is reclaimed, and the face of the Virgin assumes an evidence

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of satisfied revelation."—*Lectures on Art. London, MacMillan & Co.*, 1882, *pp.* 43–45.

Observe here Giotto credited with "clearness of invention" generally; "invention" of the actions of hands; and "invention" consisting in appropriately varying the expressions of the countenance.

The exclusive rights to be secured to such *authors* and *inventors* are to their respective "*writings*" and "*discoveries*."

Writings consist of letters and characters formed on paper, wood, stone, or other material, for the purpose of recording the ideas which characters and words express, or of communicating them to others by visible signs.—*Webster's Dict.*

Discoveries relate to things that are discovered; that is, disclosed; laid open; exposed to view; made manifest; shown.—*Webster's Dict.*

Construction of the terms "Authors," "Inventors," "Writings," "Discoveries."

Thus it appears that the term "*writings*" includes the methods of conveying ideas to others by means of characters and words—this has been extended by judicial construction to include original designs for engravings, prints and the like—while the term "*discoveries*" includes every other means by which an author or inventor *expresses* or makes *manifest* his invention or the matter of which he is the author, so that it can be identified as his, *discovered* or *expressed*, or made *manifest*, according to the art employed by him; these as used in the Constitution, being correlative terms to cover and include every form in which authorship or invention is capable of being communicated or expressed to others.

It is evident that what the law really seeks to protect is *the ideal invention or creation of the mind*, but as it is not practicable to give protection to that

directly, the protection is given indirectly to certain materializations, or conventional and intelligible expressions thereof; to the vehicle of communication, so to speak. Was it ever supposed that the *writing*, in the sense of *manuscript* of authors is to be protected? Is it not well known that the manuscripts of some of our most useful authors required almost expert skill to decipher them? Is it not the *printed work*, that which is purely mechanical, that is, after all, the practical subject of copyright protection? And so with the engraver and etcher. Is it the wooden block or the metal plate, with its lines or scratches that is protected? Is it not rather the *print* which is merely a mechanical continuation of the artist's work, that receives the protection. Mechanical work, too, which in nearly all cases is performed by machines, over which the artist has no control, and which simply deposit on paper the amount of ink applied to them. Practically, it is only the work of the painter or the sculptor that can reach the public in the condition in which it leaves the hands of the author, and without the intervention of some other agent, whether natural or mechanical. And yet under the reasoning of the infringer in this case, that is the very work that could not be protected, for it is not a writing.

It may be said then broadly, that as used in the Constitution and also as used in the copyright law, the terms "*authors*" and "*inventors*" describe those who have the mental conception, invention or creation, abiding only in the mind, uncommunicated, or unexpressed; and the terms "*writings*" and "*discoveries*" describe generally all intelligible forms of *manifesting* or *expressing* the same, irrespective of the special meanings of the terms *writings* and *discoveries*, and it is these manifestations and expressions which are the subjects of protection.

If the construction of the infringer in this case could prevail, then, of course, Congress could protect only *writings* and certain *discoveries*, that is, the

discoveries of *inventors*. But the law protects *inventions* as well as *discoveries*, it protects *pictures* and *printed matter*, as well as *writings*. Nay, it goes further even than that. It protects *scenes* or *representations*, though they are only *described*, and when carried out or produced without the intervention of the author of the description, showing clearly that it is the ideal that is protected, though the law can reach it only through the material.

If a dramatic author writes an original scene to be performed in pantomime, he is the *inventor* and *discoverer* of *that scene*, and the right to reproduce it is secured to him.

Says Judge Blatchford, in *Daly* v. *Palmer*:

"A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition, designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas."

And upon invention and infringement in this class of property, the same learned judge continues:

"It is true that in one, A is a woman, and in the other A is a man; that in one A is confined in a surface railroad station shed, and in the other A is confined in a cellar abutting on the track; that in one A uses an axe, and in the other A uses an iron bar; that in one A breaks down an iron door, and in the other A enlarges a circular hole; that in one B is unconscious and is fastened to the rails by a rope, and in the other B is insensible and is not fastened; and that in one there is a good deal of dialogue during the scene, and in the other only a soliloquy by A, and no dialogue. But the two scenes are identical in substance as written dramatic compositions in the particulars in which the plaintiff alleges that what he has invented and set in order in the scene has been appropriated by Boucicault."

* * * * * *

"As in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious

part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so in the case of the dramatic composition, designed or suited for representation; the series of events directed in writing by the author in any particular scene is his invention, and a piracy is committed, if that in which the whole merit of the scene consists is incorporated in another work without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and language in the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention—that which required genius to construct it and set it in order—remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy if the appropriated series of events when represented on the stage, although performed by new and different characters using different language, is recognized by the spectator through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order."

Daly v. *Palmer*, 6 Blatchf. at pp. 264, 265, 269.
See also, *Binns* v. *Woodruff*, 4 Wash., 48, at p. 51.

It is evident from the foregoing that some forms of *invention* can be secured by copyright, and that protection by copyright is not confined to a writing, strictly so-called.

The inventions, conceptions or creations of the mind may be retained in the mind, and may thus remain fruitless and incapable of promoting the progress of science and useful arts. Congress is not authorized to grant any protection to these efforts of the mind alone.

But the conceptions, inventions and creations of the mind may be manifested, expressed, or discovered in many ways and according to various arts.

Every art has its own peculiar methods and forms of such expression, mainifestation or discovery, *e. g.:*

Some arts discover their objects directly to the eye, as painting, sculpture, photography, etching, engraving, etc.

Some arts discover their objects by means of words conveyed to the mind, as history, poetry, romance, etc., writings in the strict sense of the word.

And then there is the art of music, or of musical composition.

The invention, conception or creation of the mind, may be something entirely original and unknown, as when an author invents a plot, a composer an air, a sculptor a figure that represents a passion or a condition, a dramatist the incidents and situations in a play, etc.

On the other hand, invention may consist in an original method or form of expressing, manifesting or discovering something already known, according to certain arts.

Shakespeare's Hamlet, Powers' Greek Slave, Church's painting of Niagara, and Victor Hugo's Waterloo, are all inventions, and are all expressed, manifested or discovered, according to different arts. They can, however, be readily identified as belonging to their respective authors and can be the subject of copyright protection; but there is a very important difference in the method or form of the expression, manifestation or discovery.

For the purpose of securing the right, the particular form of manifesting, expressing or discovering is not important, if it is one of those which the Legislature has seen proper to provide for, *i.e.*, a book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, painting, drawing, chromo, statue, etc., and any one who expresses or manifests or discovers his invention or design according to the rules of any of these arts, is, for the purposes of the copyright law,

the author, inventor, designer or proprietor thereof, and entitled to the sole liberty of multiplying that particular form of expression, manifestation or discovery.

The painter cannot claim that the sculptor is not an author, inventor or designer because he does not discover his invention by means of color; nor can the sculptor claim that the dramatist in not an author, inventor or designer because he does not discover his inventions in the form of sculpture; each one in his particular art expresses, manifests or discovers his inventions according to the rules, requirements or limitations of his own art; and is protected against the copying of his invention and discovery without his consent.

It is submitted that any other construction would evade this plain provision of the Constitution and fail to carry out the obvious intent of Congress, and cannot be adopted.

This must, therefore, be taken as the true interpretation and construction of these provisions; and it follows that if the invention is discovered, manifested or expressed as a

Writing, or by characters, no one may reproduce it in writing or characters; if as a

Play, or musical composition, no one may reproduce it in such form, whether by different characters or with different musical instruments; and if as a

Picture, in the form of a painting, engraving, photograph, etching, or what you will, no one may reproduce it as a picture.

The Subject before the Court.

Now examine the subject of this suit:

It is admitted that Sarony paid a large and valuable consideration for the privilege of making this picture; it is further admitted that the plaintiff made this photograph and the negative thereof; it is further admitted that this picture or photograph ("Exhibit A, April 14, 1882") is a new, useful,

harmonious, characteristic, and graceful picture; that it is the original invention and design of Sarony, made by him entirely from his own original mental conception; that he posed Oscar Wilde before the camera, selected and arranged the costume, draperies and other various accessories in said photograph; arranged the subject to present graceful outlines, arranged and disposed the light and shade, suggested and evoked the desired expression, and from such disposition, arrangement or representation made entirely by Sarony, produced the photograph which is the subject of this suit, and that these varions acts constitute an author, inventor and designer in the art of photography. But it is claimed that this invention is not the subject of copyright protection because it is "discovered" in the form of a photograph.

Let us examine this argument a moment. It is conceded that no such picture or scene as is depicted in "Exhibit A" existed until Sarony placed the same in order, "invented it," that prior to making the negative, Sarony had had the conception of this invention in his mind; but he had not stopped there; he had designed and set in order the whole scene or picture which he desired to discover or express or manifest; having done that he might have selected various forms of making it permanent, "discovering" it; he might have given it a permanent form, as an oil painting—he has made many such; or as a drawing in chalk or charcoal, he has also made many such; or, if he were an engraver or etcher, he might have engraved or etched it; if a sculptor, he might have made a statue of it; in any of these forms, it is conceded, his right to protection could not be questioned.

Having admitted all this, they however still urge that all a photographer does is to take his camera, get his focus, and produce his picture, just as the hunter aims his gun, pulls the trigger, and lodges a bullet in the mark. Of course it is possible that there may be such cases, and such photographs,

and when one of them comes up for adjudication, doubtless the Court will consider that view But in this case the plaintiff in error try to ignore or overlook the fact that the picture or scene from which Exhibit A was made, had no existence until invented, created, or set in order by Sarony. And they admit that up to the point of fixing or making permanent the picture or scene which is the subject of this suit, putting it into permanent, salable form, the author or inventor took all the steps which the painter, engraver, or sculptor would have taken. (*Record, side folio* 10, *and the Answer*, side folios 22 and 23.)

The same argument could be applied to a book, and in case it was originally put on paper by the printing machine called the "type writer," the infringer's argument, as in this case would be, that the constitutional provision is limited to *writing*, that in a writing there is a personal element, the writer selects his pen, his ink, he forms his characters by hand, by a comparatively slow and laborious process, there is an originality, so to speak, in every character, while if the machine is used, natural law does it all, the button pressed by the finger produces inevitably the same letter or character, whether it be the finger of a Macaulay, or the finger of an idiot that presses it.

The answer to these arguments would be the same: it is the creation or invention that is protected; but of necessity the law can only attach protection to the material thing which discovers, fixes, makes permanent, or serves as a vehicle of communicating that ideal.

This view is supported by *Turner* v. *Robinson*, 10 Ir. Chan. 510. In that case the picture of the death of the poet Chatterton was carefully and minutely studied by a person who afterwards, at his own house, and from his own recollection, arranged figures and furniture, etc., so as exactly to represent the pictured scene in all its details. The idea so stolen and embodied he then stereoscopically photo-

graphed. And the Court of Appeal in Chancery restrained a publication of the photograph.

The plaintiffs in error entirely misapprehend the objects and scope of the copyright law. On their theory there can be no copyright protection under the statute, as controlled by the Constitution, for a print, engraving, picture, or statue. Their idea is that any one can make a photograph, and that therefore no one can have a sole right to his particular photograph. They entirely fail to observe the distinction between *the right to make a picture of an object* and *the right to copy such a picture* after it is made. Herein lies the distinction between copyright protection and protection by letters patent. No one is authorized to produce a patented article though he should be an inventor of it, and never have known that it was previously patented to another inventor; but any one is authorized to make a picture of any subject he may desire; the prohibition extends only to *copying*, directly or indirectly, the picture of another which has been copyrighted.

Nor is it a proper construction of this statute, as claimed by the infringers, that the same protection is granted *to all photographs and negatives*. As well might it be said that the same protection is granted to all inventions and discoveries under the patent law; and to all books, prints, etc., under the copyright law. In every case the Court determines whether the subject matter in litigation is or is not a proper subject matter for protection *under the law*. And just as inventions and discoveries, books and prints, have been passed upon, and determined to be or not to be properly the subject of protection *under the law*, so it will be with photographs and negatives thereof. But, just as the fact that books have been or may be written which cannot receive protection under the copyright law, is no ground for declaring the law unconstitutional; so, though photographs may be imagined by the infringer, which it is argued cannot be protected, that

is no reason why the law must be declared unconstitutional as to all photographs. Every case, as it arises, will be properly decided by the court upon its own merits.

In regard to protection by copyright, it may be said that so far as the several arts provided for are concerned, the purpose is the same, *i. e.*, that the person who, by the promised protection, is led to produce meritorious works in his particular art, works of sufficent value to be pirated, may be secure from invasion.

It is not deemed neccessary to take up the time of this Court with an elaborate discussion of the distinction between the statutes relating to patents, trade-marks, and copyrights. The rules governing such property are familiar.

The limitations and requirements of the art of the photographer, are of course peculiar to that art, and differ from other arts, and we do not claim that a photographer has the scope for his work which the painter or sculptor has. His field is narrower. He must set in order his whole picture, he must arrange his light and shade, his drapery, his proportions, his distances; in fact he must create exactly what he wants to convey—no chance for adding artistic touches after the picture has once been taken. All the characteristic features, the expression, the position, the pose, the surroundings, must be complete and perfect. But it must be assumed that with a knowledge of the limitations and requirements of this art, Congress considered it to be a useful art, such an art as was the proper subject of protection.

The infringers do not allege or claim that photography is not a useful art, but the claim is that Congress could not grant protection, *by the copyright law*, for a picture made by that art; and the argument was substantially as follows:

That when the Constitution was being framed it was proposed to include in it copyright for books, and patents for inventions; and therefore, it was asserted, this provision of the Constitution must be

interpreted and construed with reference to the laws of England for copyrights and patents, as they then existed. Starting with this view, it was claimed that the protection by copyright was limited to books or writings in the strict sense of the word, and any other invention that could be protected at all, came under the class for which patents are to be granted, and that, therefore, as this photograph is not a book nor a writing, it cannot be protected under the copyright law, and the plaintiff's case must fail. And it was urged that the case of *Wood v. Abbott*, 5 Blatchford, 325, bore directly upon this point. So far as that case is concerned, it is enough to say that the only point decided was, that a photograph is not a print or engraving, etc., and Judge Shipman called especial attention to the fact (see p. 329) that subsequent to the copyright set up in that suit, Congress had passed the act granting copyright protection to photographs, and he nowhere suggests a doubt as to the power of Congress to pass such a law. Aside from that, however, it is clear that the form in which the exclusive right is to be secured—whether, in any particular case, by a patent or by a copyright—is not defined by the Constitution. That is merely a matter of administrative detail, and the Constitution does not enter into details. That instrument points out the objects to be attained; the Legislature provides the means of attaining them. It has seen fit to establish one department, with clearly defined limits, in which inventions in certain of the useful arts are to be secured by patents, and another department, also with clearly defined limits, in which writings and inventions in certain of the useful arts are to be secured by copyright; and that the invention and discovery in question comes under the department of copyright, whether it be a writing or not, can admit of no doubt; the law is explicit upon that subject.

Both at common law and under the statute the right of property in pictures and photographs has

been before the Courts, and the restrictions upon infringers have been determined in a spirit liberal to the authors. It is only necessary to suggest a few cases.

Turner v. *Robinson*, 10 Ir. Ch. R., 142 510.
Prince Albert v. *Strange*, 2 De G. & Sm., 652, 693, 1 M. & Gor., 25.
Parton v. *Prang*, P. O. Off. Gaz., 619.
Myall v. *Highey*, 1 Hurl. and C. Exch., 148.
Strahan v. *Graham*, 15 Weekly Rep., 487.
Grace's Case, L. R., 4 Q. B., 715.

Further observations respecting the Constitutinal Provision.

But there is another consideration of the views of the infringer that very clearly demonstrates their fallacy.

In the proper construction of an instrument like the Constitution, inquiries to ascertain what restricted meanings of general terms used may have been in the minds of some of the framers, are not admissible to limit the general terms in the instrument. For the Constitution partakes of the character of a league, and having been adopted, it presents, for the purposes of construction, some of the elements of a contract. However, an examination of the facts shows at once that there was no such restriction or limitation attached to the terms, as is here claimed. These general terms were not adopted at random or because the limited words had escaped attention.

Had the framers of the Constitution *intended* that the law of patents, or of copyrights as then understood and expounded, should be adopted or become the guide for future legislative action, those terms would have been used, for those terms were before the Convention:

"Saturday, August 18, 1787. Mr. Madison submitted, in order to be referred to the Committee of Detail, the following powers, as being proper to be added to those of the general Legislature:

* * * * * *

"To secure to literary authors their copyrights for a limited time."

* * * * * *

"To encourage, by premiums and provisions, the advancement of useful knowledge and discoveries."

And on the same day Mr. Pinckney submitted the following:

"To grant patents for useful inventions.

"To secure to authors exclusive rights for a certain time."—*Elliott's Debates*, vol. 5, pp. 439, 440.

And on September 5, 1878, the provision of the Constitution as it now stands was reported from the committee of eleven, (Ibid, pp. 510, 511), and was unanimously agreed to (p. 512).

It is therefore a very significant fact that the terms "*patents*" and "*copyrights*" were carefully avoided, and do *not* appear in the Constitution. It would not be a gracious thing to say that those great men builded better than they knew, for it is apparent that they knew well how they were building. And it seems self-evident that the Constitutional provision was intentionally expressed in such general terms to enable the Legislature to provide for new arts, for new sciences, for new conditions, as they should arise, and as public interest should require.

Says Justice Story, speaking of the Constitution:

"* * This instrument, like every other grant, "is to have a reasonable construction according to "the import of its terms; and where a power is ex- "pressly given in general terms, it is not to be re- "strained to particular cases, unless that construc- "tion grow out of the context expressly, or by neces- "sary implication. The words are to be taken in "their natural and obvious sense, and not in a sense "unreasonably restricted or enlarged. * *

"The instrument was not intended to provide "merely for the exigencies of a few years, but was "to endure through a long lapse of ages, the events "of which were locked up in the inscrutable pur- "poses of Providence."

Martin v. *Hunter's Lessee*, 1 Wheat. 326.

It is further insisted that the law in question should be held constitutional, for the rule has been laid down in this Court by Chief Justice Marshall, that to warrant the Court in setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist.

"The question, whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the Legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Fletcher v. *Peck*, 6 Cranch. 128.
See, also, *U. S.* v. *Wonson*, 1 Gallison, pp. 4, 18.
Ogden v. *Saunders*, 12 Wheat. 213.

As it is also further admitted that every act required by law to be done to duly secure the copyright to this photograph to the plaintiff, was done; that prior to the defendant's infringement plaintiff made great gains and profits from this copyrighted photograph, and that with full knowledge of all these facts and circumstances the defendants worked, copied and printed eighty-five thousand copies like "Exhibit B, April 14, 1882," of this copyrighted photograph, and sold or exposed the same to sale, in the city of New York, the judgment of the Court below, upon this point, should be affirmed.

II.

The other point raised by the defense is that the *notice of copyright*, given by Sarony, is not a sufficient notice under the statute, to enable him to maintain an action for infringement.

The Notice of Copyright.

The thing to be ascertained, then, is what the law requires in that respect. The act is in the following words:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, by inserting in the several copies of every edition published, on the title page, or the page immediately following if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: "Entered according to the act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington;" or, at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B."

Laws of 1874, chap. 301.

The infringers claim that the requirement of the last form of notice above given can only be complied with by inserting the *whole* Christian name and the surname of the person claiming the copyright, whether he be known by such names or not, on the theory that the law always and under all circumstances requires a whole Christian name and the surname, when a "name" is required, because such a requirement exists as to names in indictments and in other judicial records. And many cases, upon indictments and other solem judicial records, were cited. It may be conceded that in indictments, and in some solemn judicial records, the whole of the *Christian* and *surname* are required; but we claim that such strictness is not exacted when the law merely provides for the *notice* of a fact to be given, as in this case, the notice that

there is a copyright, so that no person can innocently infringe it without notice of that fact.

So it is a well-established rule that the law knows only one Christian name, and that a middle name or initial is to be disregarded. But this rule also is not so rigid as to exclude inquiries in regard to middle names or initials. (See *State* v. *Gates*, 43 Conn., 533). It has also been held that a letter, mark, or even a number, may be used as a name, *pro hac vice*, though one is not generally known thereby (*David* v. *Williamsburgh City Fire Ins. Co.*, 83 N. Y., 265.) It is therefore evident that the law always looks at the substance—not the form.

The true way to ascertain the requirement and meaning of a law, is to consider its purpose.

Now, the purpose of the requirement in these statutes is to *give notice of the copyright* as a condition of bringing an action, just as under the patent law a patented article is required to be marked "patented," and when that purpose is complied with, when the intending infringer has *notice* that the article is copyrighted, he has all that the law means to give him in or by this imprint on the article. As the learned Judge said in deciding this case at *nisi prius*, "if the letter of the law is not violated, and its object accomplished, it is enough." The *notice* is the mandatory requirement, the name is merely incidental.

Construction of the Requirement as to Notice.

That this is the true test and applicable to the case at bar, will appear from the decisions upon this very point rendered by the Courts in England.

The English Statute, 8 Geo. 2, Ch. 13, § 1, after granting the term for 14 years to the proprietor of the engraving, etc., continues:

"to commence from the day of the first publishing "thereof, which shall be truly engraved with the "name of the proprietor on each plate, and printed "on every such print or prints."

Under this it was held in *Thompson* v. *Symonds*, 5 Term Rep. 41, 1792 (Lord Kenyon, *C. J.*, and Buller and Grose, *J. J.*,) that it was good compliance with the law to print the following:

"Painted by Bowyer; engraved by Fitler; published as the act directs by Bowyer, 26th August, 1790."

Also in another plate (after assignment to Thompson), the last part was altered thus:

"Published as the act directs by Thompson, 26th August, 1790."

Bonner v. *Field* (Sitttngs after Hilary, 1781, at Guildhall, cor. Lord Mansfield), was cited, in which the notice read:

"Drawn and engraved by J. Bonner; published on the 1st of June, 1778, as the act directs."

And the sufficiency of the name was not doubted, but the case was dismissed because the plaintiff was not the owner on the 1st June, 1778.

Newton v. *Cowie*, 4 Bing., 234 (1827, May 28, Best, *C. J.*), it was held that,

"In order to maintain an action for pirating prints, the proprietor's name and the date of publication must appear on the original print, pursuant to 8 Geo. 2, c. 13, but it is not necessary that the designation 'proprietor' should be added to the name."

The words on the prints were, "*Newton del. 1st May*, 1826. *Gladwin sculp.*" held good compliance with the law.

In *Graves* v. *Ashford*, 15 Weekly Rep. 495, it was held that "*Henry Graves & Co.*" was a good compliance with the law, although there was no company.

Rock v. *Lazarus*, 15 Equity Cases, 104, *Sir R. Malins*, V. C., after stating the facts, continued:

* * * * *

I take it to be perfectly clear that the plaintiffs are generally known as Messrs. "*Rock & Co.*," which is the name under which they trade. But it

is said that merely to inscribe the trading name is not a compliance with the *Copyright of Designs Act*, because it does not give the names of the proprietors. Then, the question is, What is required to be given as the name of the proprietor? Is his Christian name required, as well as his surname? *Newton* v. *Cowie* has already decided that the surname is sufficient. In the present case the name of the firm under which the plaintiffs trade has been given; and since it has been decided that the whole name of the proprietor need not be put on a print or engraving, it appears to me to follow that it is quite sufficient to give the name of the firm under which the proprietors trade.

* * * * *

I think that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue. The plaintiffs are consequently entitled to the injunction.

The words on the print were, "*Rock & Co., London.*"

In *Weldon* v. *Dicks*, 27 Weekly Reports, 639, it was also claimed that the full name should be inserted, but the Court held that "*Newby & Co.*" was a sufficient compliance with the law.

It is seen from the above cases that this technical point has been often raised in the English Courts, *and that in every instance it has been overruled.*

Further suggestions as to the form of the Notice.

When a full name is required in a *mere notice*, the Legislature does not leave that to inference, but states the requirement, as in the 26 of Geo. 2, entitled "*An Act for the better preventing of clandestine marriages;*" where in §2 it is provided that no parson, etc.,

"* * shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall * * * deliver or cause to be delivered to such parson, etc., a notice in writing of their true *Christian and surnames*, * * "

It is, therefore, evident that the law does not always require the whole Christian and surname, unless that requirement is expressly stated.

But from an examination of the United States statute as a whole, and from the practice of the Librarian of Congress, it further appears that no such requirement exists.

The statute does not require the whole name of the author, inventor, or designer, to be registered in the Library of Congress at Washington, where the Records are kept. *Rev. Stat.*, § 4956, § 4957.

The Librarian of Congress performs all acts and duties required by law touching copyrights, under the supervision of the Joint Committee of Congress on the Library (*Rev. Stat.*, § 4948), and he does not require or record the whole Christian name (Record, side fols. 45–49).

Great stress is laid upon the claim that a name different from the trading or business name of the person taking out the copyright, is required in order to bring suits or get information, etc. That that is not the object of the *notice of the copyright* is evident from the fact that no place of residence or business is required therein. A notice giving the name "John Smith," in full, would not help the public, they would still have to ascertain what particular person was intended. So in regard to firm names. It would hardly be urged that a notice reading "*Copyright*, 1882, *by Harper & Brothers*," was not a compliance with the law, but that it should be "*by John Harper, James Harper, Joseph Wesley Harper, Fletcher Harper*," *etc., etc.*, in order to give the public notice as to the persons to be sued, or of whom information is to be had. Clearly the name by which the author, etc., is generally known in his business is all that the law requires in this *notice*.

The essential or mandatory part of the law is that notice of the copyright must be given, the form is merely directory.

This is further evident from reading the requirement of the statute, that is, that the notice must be given by inserting the following words: "Entered according to Act of Congress in the year —, by A. B., in the Office of the Librarian of Congress at Washington."

This was the provision of the Statute from 1831, and it still exists. A strict compliance with the words (here insisted on) would make nonsense of the requirement. But no clause in the law provides that the *whole* name or any portion of the name should be inserted in that notice; A. B. would answer the words of the Statute, giving it the strict construction claimed by the defendants.

But while it is evident that the insertion of "*N. Sarony*," in the place of "A. B.," in the above form of notice would have been a compliance with the law, it is argued that in this form of notice

"Copyright 18—by A. B.,"

the insertion of "*N. Sarony*" in the place of "A. B.," is not sufficient.

Such a construction is not required, either for the purpose of giving notice of the copyright, or of complying with any well settled rule of law. The notice here corresponds with the record of the title in Washington. (See Records, as above.)

It follows, therefore, from the admissions by the plaintiff in error, that the name in the notice is sufficient, for it is admitted (*Record*, fols. 23, 34,) that the plaintiff is, and for many years has been known by his surname alone, that he carries on business in the name of "Sarony" alone, and that it is a general custom in the photograph business to use only the surname. That this is a fact is matter of common observation and addresses itself to every one.

It is submitted, therefore, that under the well-settled decisions and from the requirements of the statute itself, the name in the notice of copyright is sufficient.

Is this a Penal Statute?

A suggestion was made that the statute sued on is a penal statute, and therefore the defendants argued for such a construction of it as would enable them to violate it with impunity.

This statute, however, is not penal, as the defendants contend, even though in some applications of it, a recovery under it might give to the plaintiff something that belonged to the defendant, but this is not as a *punishment* of the defendant, but as a *remedy* for the plaintiff. But that would not be the result in this case. The only forfeiture which the plaintiff can recover in this case, that has even the remotest resemblance to a penalty, is the ten dollars in the second cause of action.

And that is not strictly a penalty, as the law defines penalties for strict construction. Such a construction is only adopted in cases of *crimes*, when an effort is made to expand a statute by construction so as to apply it to cases not within the letter or spirit of the law. But even in such cases such statutes "are not to be construed so strictly as to "defeat the obvious intention of the Legislature. "The maxim is not to be so applied as to narrow "the words of the statute, to the exclusion of cases "which those words, in their ordinary acceptation "or in that sense in which the Legislature has "obviously used them, would comprehend."

U. S. v. *Wiltberger*, 5 Wheat., 76, at p. 95.

"In expounding a penal statute, the Court will "certainly not extend it beyond the plain meaning "of its words; for it has been long and well set- "tled that such statutes must be construed "strictly. Yet the evident intention of the Legis "lature ought not to be defeated by a forced and "over strict construction."

U. S. v. *Morris*, 14 Peters, 464, at p. 502.

The above quotations are from decisions by Chief Justices Marshall and Taney, in *criminal* prosecutions by the Government.

But when the forfeiture is for a redress for an injury, the rule is different, and the strict construction claimed is not adopted, and the statutes are held to be remedial.

In *Stanley* v. *Wharton*, 9 Price, 301, a statute which provided that if any person shall willfully assist any tenant in fraudulently conveying away, or concealing any part of his goods, every person so offending, shall forfeit and pay to the landlord, double the value of the goods, etc. *Held* to be entirely and purely remedial. See p. 310.

In *Stockwell* v. *United States*, 13 Wallace, 531, the following provision:

"That if any person or persons, shall *receive*, "*conceal* or *buy*, any goods wares or merchandise, "knowing them to have been illegally imported "into the United States, and liable to seizure, by "virtue of any act in relation to the revenue, such "person or persons, shall, on *conviction* thereof, "forfeit and pay a sum double the amount or value "of the goods, wares or merchandise so received, "concealed or purchased." §2, 3 Stat. at Large, p. 781.

Held, to be remedial and not strictly punitive, and that rules of evidence in civil actions were proper, rather than strict rules in penal actions. In speaking of it the Court says:

"It must therefore be considered as remedial, as "providing indemnity for loss. And it is not the "less so because the liability of the wrongdoer is "measured by double the value of the goods re- "ceived, concealed or purchased, instead of their "single value." * * "Double the value may "not be more than complete indemnity." p 547.

See also *Howe* v. *Taylor*, 6 Oregon, 284, at p. 295.

So in this case, it is evident that the forfeiture of ten dollars is in no sense a punishment of the defendant, but is a small, a very small remedy for the plaintiff. The forfeiture of the infringing articles themselves, or their value, is never an adequate remedy for the invasion of a copyright. The plaintiff's goods are cheapened, his market is destroyed; for

it is well known that only such copyrights are violated as promise in their violation a profit to the pirate, and then it is done, as in this case, by placing something cheap, something obtained without outlay, upon the market in competition with what is valuable and produced at great expense; and the dollar for every copy recoverable under the statute, is in the nature of liquidated damages for the wrong suffered.

The Statute strictly remedial.

So far, however, as the first cause of action is concerned, the statute is strictly remedial, and is for the only remedy which the Legislature has seen fit to provide. In the case of a book (see Rev. Stat. §4964) damages can be recovered, but in the case in suit the only relief is to take the infringing articles, or their value. (Rev. Stat., §4965).

There is not even a forfeiture in this case of any proportionately valuable thing that belongs to the defendants. The value consists in the *picture* that is pirated, and that never was the property of the defendants. The only things actually forfeited by them are the stones upon which the picture was copied, and the paper upon which it was printed, the whole taken together, paper and stones of the 85,000 copies printed by plaintiff in error, not worth above fifty dollars, aside from plaintiff's pictures upon them.

So far then as any forfeiture or penalty is concerned, this statute, which purports to *secure* a valuable right (Rev. Stat., §4952) to the author, if construed as claimed by the infringers, would, in fact, impose a severe penalty on the author, for it would enable the infringers to invade the author's sole liberty, secured to him by the Constitution and the law, to possess themselves of property belonging to him to the value of thousands of dollars, by wrongfully intermixing with it fifty dollars worth of their property—and that only as the mere vehicle for absorbing the authors property.

But that is not the proper or reasonable construction of the law, whether it be common or statutory. If one invades my premises, carries off my grain, and converts it into alcoholic liquor, I can recover the product. Or if my trees are taken and converted into shingles; or into the frame of a boat; or into cordwood; in each case I may recover the product; and yet in each of those cases there is a forfeiture of something belonging to the trespasser, as clearly a forfeiture as in the case at bar, and just as in the case at bar the necessary and reasonable result of the trespassers own act. As Chief Justice Cooley intimates, in the Michigan cases, if any other rule were adopted, "the man who by *mistake* carries off "the property of another will next be demanding "payment for the transportation." But a willful trespasser, who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein.

Church v. *Lee*, 5 Johns., 348.
Burris v. *Johnson*, 1 J. J. Marsh, 196.
Salisbury v. *McCoon*, 3 N. Y., 379.
Isle Royal Mining Co. v. *Hertin*, 37 Mich., 322.

In this case there is no pretense on the part of the plaintiff in error that their piracy was innocent or unintentional, they deliberately and as a business matter to make money for themselves, pirated our property, flooded the market with the cheap prints of our photograph, and their claim, could it be sustained in Court, would undermine all the well-settled rules of property, destroy incentive to progress in art, reprove honesty in business, encourage piracy, and make law a mere form to be evaded at will.

They are entitled to no interpretation of the law that will encourage and support them in such enterprises; and the judgment below should be affirmed.

Respectfully submitted,

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